TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903

No. 78.

DAVIDSON BROS. MARBLE COMPANY, SAMUEL A. TOLMAN, AND JOHN A. TOLMAN, PLAINTIFFS IN ERROR,

vs.

UNITED STATES OF AMERICA ON THE RELATION OF MURRAY GIBSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED MAY 4, 1903.

(20,698.)

(20,698.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 304.

DAVIDSON BROS. MARBLE COMPANY, SAMUEL A. TOLMAN, AND JOHN A. TOLMAN, PLAINTIFFS IN ERROR,

vs.

UNITED STATES OF AMERICA ON THE RELATION OF MURRAY GIBSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Complaint	1	1
Exhibit A—Bond	8	4
Exhibit B—Agreement of July 25, 1902	11	7
Summons	22	13
Lis pendens	24	15
Affidavit of publication	26	16
Demurrer	28	17
Motion to quash service and dismiss	30	18
Order denying motion to quash and overruling demurrer	32	19
Petition for rehearing on motion to quash service, &c.	33	19
Points and authorities in support of motion	34	20
Order denying motion for rehearing	39	23
Stipulation extending time to answer	40	23
Order for default	41	24
Order for entry of judgment	42	24
Judgment	43	25
Certificate to judgment-roll	45	26
Opinion on motion to quash and on demurrer	46	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1907.

	Original.	Print.
Bill of exceptions	50	28
Motion to quash	50	29
Demurrer to complaint	51	29
Return of marshal	52	30
Order for notice of pendency of suit	53	31
Affidavit of publication	54	32
Motion for rehearing	55	33
Rule 22 of the circuit court of the United States, northern district of California	56	34
Rule 75 of the circuit court of the United States, northern district of California	57	34
Judge's certificate to bill of exceptions	58	35
Petition for writ of error	59	36
Assignment of errors	60	36
Bond on writ of error	61	37
Certificate of judge as to jurisdictional question	63	38
Order extending time to file record	65	39
Clerk's certificate to record	66	39
Writ of error	67	40
Return on writ of error	67½	41
Citation	68	41

1 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA on the Relation of MURRAY GIBSON, Trading as John Gibson, and for His Use and Benefit, Plaintiff,

vs.

DAVIDSON BROS. MARBLE COMPANY, a Corporation Organized under the Laws of the State of Illinois, and SAMUEL A. TOLMAN and JOHN A. TOLMAN, Residents of the State of Illinois, Defendants.

Plaintiff complains and alleges:

I.

That the defendant, the Davidson Bros. Marble Company, is a corporation duly formed, organized and existing under the laws of the State of Illinois, and a resident and citizen of said State; and that the defendants Samuel A. Tolman and John A. Tolman are residents and citizens of the State of Illinois.

II.

That heretofore, to wit, on the 10th day of October, 1901, said plaintiff did make and enter into a certain contract in writing with the defendant, the Davidson Bros. Marble Company, whereby the said defendant did agree with the said plaintiff to furnish all of the labor and materials, and do and perform all the work required for the interior finish complete, except heating apparatus, plumbing, electric wiring, conduits, etc., for the Post Office and Court

2 House Building at San Francisco, in the State and Northern District of California, at which said place said contract was to be performed and executed, in accordance with the requirements of certain drawings in said contract specified, and such other drawings as might be furnished to the said defendant by the Supervising Architect of the United States Treasury Department; and the said defendant did also agree in said contract that the work therein agreed to be performed should be commenced promptly upon receipt of notice of the approval of the bond attached to said contract, and did agree to carry on the same in such order, and at such times and seasons, and with such force as should from time to time be directed and prescribed by the Supervising Architect or his representative, and to complete the same in all its parts within two years and four months from the date of the approval of said bond referred to in said contract and heretofore referred to in this complaint; and said plaintiff did agree to pay to the said defendant, the Davidson Bros. Marble Company, in consideration of said work, the sum of $910,000.00, as specified in said contract, which said contract was duly executed on behalf of the plaintiff by O. L. Spaulding, Acting Secretary of the Treasury of the United States, and on behalf of the defendant Davidson Bros. Marble Company, by John A. Davidson, President, and attested by Joseph Uhrig, Secretary and Treasurer.

III.

That as required by law and for a good and valuable consideration, the said defendant, the Davidson Bros. Marble Company, as principal, and the defendants, Samuel A. Tolman and John A. Tolman, as sureties, did make, execute and deliver unto the
3 said plaintiff a bond, a copy of which said bond is hereto attached, marked Exhibit "A," and by reference made a part of this complaint.

IV.

That thereafter, to wit, on the 25th day of July, 1902, said defendant, the Davidson Bros. Marble Company did enter into a certain contract with Murray Gibson, trading as and also known by the name of John Gibson, a resident and citizen of the State of Pennsylvania, whereby it was agreed that the said Murray Gibson should furnish all marble and mosaic work on the walls and ceilings of the first floor corridor, and other work in said contract specified, of said Court House and Post Office Building referred to in said contract, for the sum of $70,125.00, which the said defendant, the Davidson Bros. Marble Company, did agree to pay as follows:

90% of the value of the work, not exceeding the contract price, executed and actually in place, to the satisfaction of said Davidson Bros. Marble Company, and to the satisfaction of the said O. L. Spaulding, Acting Secretary of the Treasury of the United States, or the representative or agent of the United States authorized to estimate such work, to be paid from time to time as the work progressed whenever and as often as estimates were made by the agents of the United States, and the money was paid to the party of the first part; and it was in said contract expressly agreed that the said defendant, the Davidson Bros. Marble Company, should pay to the said Murray Gibson all the money received by it from the United States for and on account of the work contracted to be performed in said contract as fast and whenever the same should be done by the said Murray Gibson not exceeding the contract price; and
4 further, that before such payment should be due by the said Davidson Bros. Marble Company to said Murray Gibson, he, the said Murray Gibson, should furnish statements to said Davidson Bros. Marble Company for all work, labor and material furnished or contracted to be furnished by said Murray Gibson, with receipts and releases to the said defendant for and on account of the same; and said contract further provided that 10% of the estimated value of the work done should be retained until the completion of the entire work contracted to be done by the said defendant, and the approval and acceptance of the same by the United States; a copy of which said contract is hereto attached, marked Exhibit "B," and by reference made a part of this complaint.

V.

That the said Murray Gibson, trading as John Gibson, did fully and faithfully comply with all of the provisions of said contract, did perform the work and furnish the materials therein specified, and did do and perform all the conditions on his part to be done and

performed, and said work was accepted by the said defendant, Davidson Bros. Marble Company, as in full compliance with the said contract.

VI.

That the said defendant, the Davidson Bros. Marble Company, has fully and completely done and performed its contract with the United States hereinbefore referred to, and final settlement thereof has been had by the said defendant with the said United States within one year prior to the commencement of this suit.

VII.

That the said defendant, the Davidson Bros. Marble Company, has paid to the said Murray Gibson on said contract hereinbefore referred to in Paragraph IV of this complaint, the sum of
5 $65,700.00, and no further and greater sum, and that the balance, to wit, the sum of $4425.00, has not been paid, and the said defendant, Davidson Bros. Marble Company, has refused and still refuses to pay the same, or any part thereof, and the whole of said sum of $4425.00 is due and unpaid from the said defendant, the Davidson Bros. Marble Company to the said Murray Gibson, with interest thereon from the date of the completion of said contract.

VIII.

That no suit has been brought by the United States within six months from the completion and final settlement of said contract made by said Davidson Bros. Marble Company with the United States, and that after the expiration of said six months from said completion and final settlement of said contract, the said Murray Gibson did apply to the Department under the direction of which said work has been prosecuted, to wit, the Treasury Department of the United States, and did furnish an affidavit as required by law to the Treasury Department of the United States that labor and materials for the prosecution of such work had been supplied by him, and that payment therefor had not been made, and that the said Department did furnish him with a certified copy of the contract made between the said United States of America and the said Davidson Bros. Marble Company, and the bond, a copy of which said bond is attached hereto, marked Exhibit "A," and thereby the said Murray Gibson was and is authorized to bring suit in the name of the United States, in the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, (in which District said contract was to be performed and executed) for the amount due him upon his said contract, against the said contractor and his said sureties, and to prosecute the same to final judgment and execution.

6 IX.

That the plaintiff knows no other creditors than the said Murray Gibson, and the said Murray Gibson on information and belief alleges that there are no other creditors.

X.

By reason of the premises, and the statute in such case made and provided, said Murray Gibson brings this suit in the name of the

United States, in the Circuit Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, in which District said contract was performed and executed, for his use and benefit against the said Davidson Bros. Marble Company and the said sureties under said contract, Samuel A. Tolman and John A. Tolman; and also for the use and benefit of any other creditor, if any there be, who may file his claim in this action, and be made a party hereto, within one year from the completion of the work under the said contract between the United States of America, and the Davidson Bros. Marble Company. That the said Murray Gibson, before the commencement of this suit, has demanded payment of said sum of $4425.06 from the said defendants, but they and each of them have refused, and do still refuse to pay the same, or any part thereof.

Wherefore the said Murray Gibson and the said plaintiff pray that the said Murray Gibson shall recover his judgment against the said defendants jointly and severally in the sum of $4425.00, and interest from the date of the completion of the contract between the said Murray Gibson and the said Davidson Bros. Marble Company, and costs of suit, and that notice be given as required by statute, and that if any other creditors appear within the time limited by law and file their claims, said creditors may become parties to this suit, and that he, the said Murray Gibson, may have such other, further and
7 different relief in the premises as he shall show himself entitled to.

ROBT. T. DEVLIN,
Attorney for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Robert T. Devlin, being first duly sworn, deposes and says: That he is the attorney for Murray Gibson, trading as John Gibson, and plaintiff in the above entitled action; that the said Murray Gibson is absent from the City and County of San Francisco, State of California, and is a resident of the State of Pennsylvania, and therefore said attorney verifies this complaint; that he has read the foregoing complaint and knows that the same is true of his own knowledge except as to the matters therein stated on information and belief, and that as to those matters, he believes them to be true.

ROBT. T. DEVLIN.

Subscribed and Sworn to before me this 20th day of November, A. D. 1906.

[SEAL.]

J. A. SCHAERTZER,
Deputy Clerk U. S. Circuit Court,
Northern District of California.

8 EXHIBIT "A."

Bond.

Know all men by these presents, That we, the Davidson Bros. Marble Co., a corporation organized under the laws of the State of

Illinois and having executive officers in the City of Chicago, County of Cook and State of Illinois, principal, and Samuel A. Tolman of the City of Chicago, County of Cook and State of Illinois, and John A. Tolman of the City of Chicago, County of Cook and State of Illinois, sureties, are held and firmly bound unto the United States of America in the sum of four hundred fifty-five thousand dollars ($455,000), lawful money of the United States, for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of October, A. D. 1901.

The condition of the above obligation is such, That whereas the said Davidson Bros. Marble Co. has entered into a certain contract, hereto attached, with O. L. Spaulding, Acting Secretary of the Treasury, acting for and in behalf of the United States, bearing date the 10th day of October, A. D. 1901; Now, if the said Davidson Bros. Marble Co. shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by it to be performed, and shall well and truly comply with and fulfill the conditions of, and perform all of the work and furnish all the labor and materials required by, any and all changes in, or additions to, or omissions from, said contract which may hereafter be made, and shall perform all the undertakings stipulated by it to be performed in any and all such changes in, or additions thereto, notice thereof to the said sureties being hereby waived, and shall promptly make payment to all persons supplying it labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise to remain in full force and virtue.

In Testimony Whereof, The said Davidson Bros. Marble Co., principal, and Samuel A. Tolman and John A. Tolman, sureties, have hereunto subscribed their hands and affixed their seals the day first above written.

DAVIDSON BROS. MARBLE CO., [SEAL.]
By JOHN A. DAVIDSON, *President.*

Attest:

JOSEPH UHRIG, *Sec'y & Treas.* [SEAL.]
SAMUEL A. TOLMAN. [SEAL.]
JOHN A. TOLMAN. [SEAL.]

Signed, sealed, and delivered in the presence of—

WM. H. DECAMP.
ELMORE W. STEDMAN.

G. V. SMITH,
WILLIS E. DUNNING,
Witnesses to Signature of Samuel A. Tolman.
G. V. SMITH,
WILLIS E. DUNNING,
Witnesses to Signature of Samuel *A. Tolman.*

Form of Justification by Private Surety.

STATE OF ILLINOIS, *County of Cook, ss:*

Personally appeared before me, a U. S. Com's'r, the said Samuel A. Tolman, who signed the foregoing obligation, and who, being by me first duly sworn according to law, deposes and says that he is worth the sum of one million dollars ($1,000,000,) over and above his just debts, legal liabilities, and lawful exemptions; and that he is
10 not liable as surety on any other bond or bonds.

(Surety's Signature:) SAMUEL A. TOLMAN.

Subscribed and sworn to before me this 4th day of November, A. D. 1901.

CHAS. A. BUELL,
U. S. Commissioner Nor. Dist. of Illinois. [SEAL.]

Form of Justification by Private Surety.

STATE OF ILLINOIS, *County of Cook, ss:*

Personally appeared before me, a U. S. Com's'r, the said John A. Tolman, who signed the foregoing obligation, and who, being by me first duly sworn according to law, deposes and says that he is worth the sum of Three Hundred Thousand dollars ($300,000) over and above his just debts, legal liabilities, and lawful exemptions; and that he is not liable as surety on any other bond or bonds.

(Surety's Signature:) JOHN A. TOLMAN.

Subscribed and sworn to before me this 4th day of November, A. D. 1901.

CHAS. A. BUELL,
U. S. Commissioner Nor. Dist. of Ill. [SEAL.]

OFFICE OF THE U. S. COMMISSIONER.

UNITED STATES OF AMERICA,
Northern District of Illinois:

I hereby certify, That Samuel A. Tolman and John A. Tolman the sureties who have signed the foregoing bond, are known to me as residents of the City of Chicago, County of Cook and State of Illinois and citizens of the United States, and are amply suffi-
11 cient security for the amount thereof, and that the bond is good.

CHAS. A. BUELL, [SEAL.]
U. S. Commissioner, Nor. Dist. of Illinois. [SEAL.]

Exhibit "B."

Memorandum of Agreement, Made this 25th day of July, 1902, between Davidson Brothers Marble Company, a corporation of the City of Chicago, State of Illinois, party of the first part, and Murray Gibson trading as John Gibson, of the City of Philadelphia, State of Pennsylvania, party of the second part, witnesseth:

Whereas, said party of the first part has entered into articles of agreement with O. L. Spaulding, Acting Secretary of the Treasury of the United States, for and on behalf of the United States of America, to furnish all of the labor and materials and do and perform all the work required for the interior finish complete (excepting heating apparatus, plumbing, electric wiring, conduit, etc.) of the Post-Office, Court-house, etc., at San Francisco, California, in strict and full accordance with the requirements of certain numbered drawings therein referred to, and made part thereof, and such other detailed drawings as may be furnished to said Davidson Brothers Marble Company by the Supervising Architect of the United States Treasury Department; said numbered drawings bearing the signature of the said Supervising Architect, and the signature of the said Davidson Brothers Marble Company, are on file in the office of the Supervising Architect of the United States Treasury Department; which said contract and drawings so far as they relate to the work to be done by party of second part for party of first part, as herein specified are to be considered as if hereto attached, and are hereby made a part of this contract; all information concern-
12 ing the same being known to the party of the second part; and

Whereas, in the specification and avertisement for proposals for furnishing labor and materials required for said interior finish of said building, etc., it is provided that: "the contractor shall allow in his proposal the net sum of Eighty-five Thousand ($85,000) dollars (exclusive of concrete vaulting) for all the mosaic work of walls and ceilings of first story of corridor where shown, and the wall panels in Courtroom as noted on drawings, set in place complete. It is the intention of this office to advertise for designs for this work and the contractor will be required to have the work executed by the author of the successful design, provided he has proper facilities for carrying out the work;" and

Whereas, advertisements were duly made by James Knox Taylor, Supervising Architect of the United States, according to said provisions and according to law, for drawings showing designs for said mosaic work throughout said first story corridor, and for mosaic wall panels in court-rooms Nos. 68 and 115, which he would execute and complete for Eighty-five Thousand ($85,000) Dollars, and for the amount he would execute the mosaic work throughout the first story of said building according to designs indicated on drawings Nos. 500 and 501, based upon drawings Nos. 301, 365, 366, 367, 368, 369, 370, 371, 421, 423, 441, and 442, the bidder to submit

designs for the mosaic work in the two courtrooms referred to aforesaid; and

Whereas, party of the second part became a bidder under said proposition and did submit designs for the mosaic work in the said two courtrooms and offered to complete and execute the same according to such designs, and to furnish the labor, materials and complete the mosaic work throughout the said first story corridor of said building for the sum of Seventy Thousand, One Hundred and Twenty-five Dollars, and whereas said offer has been accepted;

13 It is therefore agreed, between the parties hereto, that said party of the second part shall furnish all the marble and glass mosaic work on the walls and ceilings of the first floor corridor of said building and in said courtroom Nos. 68 and 115, according to said designs indicated on drawings Nos. 500 and 501, based upon drawings Nos. 301, 365, 366, 367, 368, 369, 370, 371, 421, 423, 441 and 442, and his designs for said mosaic work in said two courtrooms,—which designs are all on file with said Supervising Architect and made a part hereof by reference thereto, and in accordance with the advertisement for proposals and specifications for the work, dated October 4, 1901; and bid of the party of the second part in response thereto, addressed to said Supervising Architect; and in accordance with the terms of said agreement between the party of the first part hereto and said O. L. Spaulding, Acting Secretary of the Treasury of the United States, hereinbefore referred to, for which work, labor and materials the party of the first part agrees to pay the party of the second part the sum of Seventy Thousand One Hundred and Twenty Five Dollars in the manner and at the times hereinafter specified.

As to this work so contracted for, said party of the second part agrees to stand in the place of the party of the first part, and to do everything in and about and concerning the same, as is provided in said contract of the party of the first part with the said O. L. Spaulding, Acting Secretary, as aforesaid, as well as in the specifications dated October 4, 1901, subject to all its terms and restrictions, so that the said party of the first part shall be indemnified and saved harmless from all loss, costs and charges in and about said portions of labor and materials.

Said party of the second part further covenants and agrees that the work herein agreed to be performed by him shall be com-

14 menced promptly upon notice delivered to party of the second part, at his place of business, and will carry on the same in such order and at such times and seasons, and with such force, as shall from time to time be directed or prescribed by party of the first part or the Supervising Architect of the United States Treasury Department, or his representative, and will complete the same in all its parts within eleven (11) months from the commencement of said work, in accordance with the contract of party of the first part with the United States of America, as aforesaid; and that all materials used shall be of the very best quality of their respective kinds; that all work shall be executed in the most skillful and workmanlike

manner, and that both the material used and the work performed, shall be in every respect to the entire and complete satisfaction of party of the first part, and of the Supervising Architect aforesaid, or his representative.

In the contract between the party of the first part and the said O. L. Spaulding, Acting Secretary, etc., aforesaid, it is provided that time is the essence of the contract on the part of the party of the first part, and that in the event that party of the first part shall fail in the performance of the entire work to be performed under said contract in the time therein referred to, the party of the first part was to pay to said United States for liquidated damages and not as penalty, the sum of One Hundred Dollars for each and every day that party of the first part shall be in default; and

It is agreed between the parties hereto that if the party of the second part shall fail in the due performance of the work to be performed under this contract by and at the time herein mentioned or referred to, or at the time required by the Supervising Architect of the Treasury Department of the United States, or his representative, the party of the second part shall pay unto the party of the
15 first part as and for liquidated damages, and not as penalty, the sum of One Hundred Dollars for each and every day said party of the second part shall be in default; and the damages herein mentioned are in lieu of the actual damages arising from such breach of this contract; and which said damages, if any, party of the first part shall have the right to deduct from any moneys at any time in its hands or owing by it, or to become due by it to said party of the second part; or to sue for and recover compensation and damages if no such funds are in its hands or indebtedness exists.

It is further covenanted and agreed that if said party of the second part shall fail to prosecute said work with such diligence as in the judgment of the said Supervising Architect of the said Treasury Department or his representative, will insure the completion of the said work, within the time hereinbefore mentioned the party of the first part may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered after fifteen (15) days' notice thereof, in writing, served upon or left at his office, or usual place of abode of party of the second part, or with the agent of said party of the second part, and said party of the second part having failed to take such acts during the said fifteen (15) days as will in the judgment of the party of the first part or said Supervising Architect, or his representative, remedy the default for which said notice was given, to take possession of the said work in whole or in part, and at the expense of the said party of the second part to complete or have completed the said work, and to supply or have supplied the labor, materials and tools of whatever character, necessary to be purchased or supplied by reason of the default of said party of the second part; in which event, the said party of the second part shall be further liable for any damage incurred through such default, and any
16 and all other breaches of this contract which may result therefrom.

Said party of the second part further covenants and agrees to hold and save the party of the first part harmless from and against all and every demand or demands of any nature or kind, for or on account of the use of any patented invention, article or appliance included in the materials hereby agreed to be furnished under this contract.

Party of the second part further agrees that it will, without expense to party of the first part, comply with all municipal or building ordinances and regulations in so far as the same are binding upon party of the first part with reference to the work herein contracted to be done, and will obtain all required licenses and permits, if any, for that part of the work herein contracted to be done; and will be responsible for all damages to persons or property which may occur in connection with the work herein contracted to be done.

It is further agreed that all of said work as aforesaid, called for by the drawings and specifications between the party of the first part and said O. L. Spaulding, Acting Secretary, etc., designs and drawings between party of the second part and James Knox Taylor, Supervising Architect, though every item be not particularly shown on the first, or mentioned in the second, shall be executed and performed as though such work were particularly shown and mentioned in each respectively; and that all material and work furnished shall be subject to the approval of the said Supervising Architect, and party of the second part shall be responsible for the proper care and protection of all materials delivered and work performed in carrying out this contract until the completion and final acceptance of same.

17 It is further agreed between the parties hereto that party of the second part will make any omissions from, additions to or changes in the work or materials provided in the contract between party of the first part and the said O. L. Spaulding, hereinbefore referred to, wherever required by the terms of the agreement between party of the first part and the said O. L. Spaulding, aforesaid, and that the valuation of such work and materials shall be determined on the basis of the contract unit of value of material and work referred to herein; or in the absence of such unit of value of material and work referred to herein; or in the absence of such unit of value, on prevailing market rates, which market rates, in case of dispute, are to be determined by said Supervising Architect, or his representative, whose decision with reference thereto shall be binding upon both parties hereto, and that no claim for damages on account of such changes or for anticipated profits, shall be made or allowed, and that all or any claims for extras be made and allowed strictly in accordance with the terms of the contract between party of the first part and said O. L. Spaulding, aforesaid, and that party of the second part herein shall at no time be entitled to claim or be allowed a greater amount for such extras or additional labor or material, than may be allowed to party of the first part under its contract with said O. L. Spaulding, aforesaid.

No addition to, omission from or changes in the work or materials

herein specifically provided for, shall make void or affect the other provisions of covenants of this contract, but the difference in the cost thereby occasioned shall be added to or deducted from the amount of the contract as hereinbefore provided, and in the absence of an express agreement, no addition to or omission from or changes in the work or materials herein provided for, shall be construed to extend the time for the final completion of the work, unless such changes or alterations of contract should involve a greater amount of work, or the order for same be given at such a time as not to permit of the work being completed in the contract time.

18

It is further agreed that all materials furnished and work done under this contract, shall be subject to the inspection of party of the first part and of the Supervising Architect, the Superintendent of the building and all other inspectors appointed by the Secretary of the Treasury of the United States or Acting Secretary with the right to reject any and all work or material not in accordance with this contract, or the contract between party of the first part and the United States before mentioned.

The work herein provided to be done, if so ordered by the Supervising Architect of the Treasury Department, or his representative, may be suspended without expense to the party of the first part as provided in the contract between party of the first part and the United States aforesaid.

The said sum of $70,125.00 to be paid party of the second part for the work herein provided, shall be payable as follows:

Ninety (90%) per cent. of the value of the work, not exceeding the contract price, executed and actually in place to the satisfaction of the party of the first part, and to the satisfaction of the said O. L. Spaulding, Acting Secretary of the United States, or of the represenative or agent of the United States authorized to estimate such work, will be paid from time to time as the work progresses whenever and as often as estimates are made by the agents of the United States, and the money is paid to the party of the first part herein; it being expressly agreed between the parties hereto, that party of the first part will pay to party of the second part, all the money received by party of the first part from the United States for and on account of the work herein contracted to be done by party of the second part, as fast and whenever the same is done by the party of the second part, not exceeding the contract price; but before such payments shall be due or payable by party of the first part to party of the second part, party of the second part will furnish statements to party of the first part for all work, labor and material furnished or contracted to be furnished by party of the second part, with receipts or releases to party of the first part, for or on account of the same, so that when any payment is made party of the first part may at all times know it is relieved from all liability either to the United States of America, or to any person or persons furnishing material or labor for the doing of the work herein contracted to be done. In the event that

19

party of the first part fails to pay party of the second part for the work as aforesaid, estimated to be completed by the United States and paid to party of the first part, then party of the second part has the option to discontinue the said work until all payments for the said work estimated as completed, shall have been paid by party of the first part and any loss of time sustained by party of the second part because of the said failure to make payments aforesaid, shall be allowed party of the second part by party of the first part in computing the time for the said entire work.

That ten per cent. of the estimated value of the said work done, will be retained until the completion and acceptance of the entire work contracted to be done by the party of the first part with the United States aforesaid, and the approval and acceptance of the same by the United States which amount shall be forfeited by the party of the second part hereto in the event of the non-fulfillment of this contract, which forfeiture it is agreed will not relieve the party of the second part from liability for and in damages sustained by reason of any breach of this contract.

It is further understood and agreed between the parties
20 aforesaid that upon the completion of the entire work contracted to be done by the party of the first part with the United States as aforesaid, and accepted and paid for by the United States Government to the party of the first part, that then the said party of the first part shall pay to the said party of the second part the ten per cent. as aforesaid and any balance that may be due him for the completion of his part of the contract work.

In testimony whereof the parties to the foregoing agreement have hereunto subscribed their names and affixed their seals this 25th day of July A. D. 1902.

(S'g'd) DAVIDSON BROS. MARBLE CO. [SEAL.]
JOHN A. DAVIDSON, *Pres.*
MURRAY GIBSON, [SEAL.]
Trading as John Gibson.

Signed, sealed and delivered in the presence of
Attest:
JOSEPH UHRIG, *Sec'y & Treas.*
Witness:
JOHN S. FILLMORE.

[CORPORATE SEAL.]

21 STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

Be it remembered that on the twenty-fifth day of July in the year of our Lord one thousand nine hundred and two, before me Wm. H. De Camp, a Notary Public in and for said County, personally appeared John A. Davidson of the above named Corporation, and being duly sworn, deposeth and saith that he was personally present at the execution of the above written Agreement and saw the common seal of the said Corporation duly affixed thereto, and that the

seal so affixed thereto is the common and corporate seal of the said Corporation and that the above written Agreement was duly signed, sealed and delivered by and as and for the act and deed of the said corporation for the uses and purposes therein mentioned, and that the name of this deponent subscribed to the said Agreement as President of the said Corporation in attestation of the due execution and delivery thereof is of this deponent's own proper and respective handwriting.

(Signed) JOHN A. DAVIDSON.

Sworn and subscribed the day and year aforesaid before me.
Witness my hand and seal.

[NOTARIAL SEAL.] WM. H. DE CAMP,
Notary Public.

(Endorsed:) Complaint. Filed November 20, 1906. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

22 *Summons.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

UNITED STATES OF AMERICA on the Relation of MURRAY GIBSON, Trading as John Gibson, and for His Use and Benefit, Plaintiff,
vs.
DAVIDSON BROS. MARBLE COMPANY, a Corporation; SAMUEL A. TOLMAN, and JOHN A. TOLMAN, Defendants.

Action Brought in the Said Circuit Court and the Complaint Filed in the Office of the Clerk of the Said Circuit Court, in the City and County of San Francisco.

Robert T. Devlin, Attorney for Plaintiff.

The President of the United States of America to Davidson Bros. Marble Company, a corporation; Samuel A. Tolman, and John A. Tolman, defendants, Greeting:

You are hereby Directed to Appear and answer the Complaint in an action entitled as above brought against you in the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California, within ten days after the service on you of this Summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon con-

tract, or he will apply to the Court for any other relief demanded in the Complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of November in the year of our Lord one thousand nine hundred and six and of our Independence the 131st.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*,
By J. A. SCHAERTZER,
Deputy Clerk.

23 I have served this writ within my district in the following manner, to-wit:—

Upon the within named Davidson Bros. Marble Company, a corporation, by reading the same to and within the presence and hearing of Joseph Urig, Secretary of the said Company and at the same time delivering to him personally a true copy thereof together with a copy of the bill of complaint on the 10th day of December A. D. 1906.

I was unable to find the President or other officer of the said company within my district.

Upon the within named John A. Tolman by reading the same to and *and* within his presence and hearing and at the same time delivering to him personally a true copy thereof together with a copy of the bill of complaint on the 10th day of December, A. D. 1906.

Upon the within named Samuel A. Tolman by reading the same to and within his presence and hearing and at the same time delivering to him personally a true copy thereof together with a copy of the bill of complaint on the 12th day of December A. D. 1906.

LUMAN T. HOY,
U. S. Marshal,
By THOS. MIDDLETON, *Deputy.*

Marshal's Fees.

3 services	$6.00
4 miles	.24
	$6.24

(Endorsed:) Filed January 24, 1907. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

24 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA on the Relation of MURRAY GIBSON, Trading as John Gibson, Plaintiff,

vs.

DAVIDSON BROS. MARBLE COMPANY, a Corporation Organized under the Laws of the State of Illinois, and SAMUEL A. TOLMAN and JOHN A. TOLMAN, Residents of the State of Illinois, Defendants.

Lis Pendens.

Suit having been commenced to recover on a bond given by defendants to secure the performance of a contract dated October 10, 1901, between the United States and Davidson Bros. Marble Company, a corporation, for certain work on the United States Post Office and Court House Building at San Francisco,

It is ordered that notice of the pendency of such suit shall be given by the attorney for the plaintiff substantially in the following form:

Notice is hereby given that a suit has been commenced in the United States Circuit Court for the Northern District of California by the United States of America, on the relation of and for the use and benefit of Murray Gibson, plaintiff, against Davidson Bros. Marble Company, a corporation, and Samuel A. Tolman and John A. Tolman, defendants, to recover on a bond given by said defendants, dated October 18, 1901, to secure the performance of a con-
25 tract dated October 10, 1901, made by Davidson Bros. Marble Company and the United States for certain work on the United States Post Office and Court House Building at San Francisco. Any creditor has a right to intervene and file his claim in such action and be made a party thereto within one year from the completion of the work under said contract and not later.

And that the same shall be given publication in "The Recorder," hereby designated as a newspaper of general circulation published in the City and County of San Francisco, State of California, where the contract was to be performed, for at least three successive weeks.

JOHN J. DE HAVEN, *Judge.*
ROBT. T. DEVLIN,
Attorney for Murray Gibson,
Trading as John Gibson.

Dated November 22d 1906.

(Endorsed:) Filed Nov. 23d 1906. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

26 *Affidavit of Publication of Notice That Suit Has Been Commenced.*

In the U. S. Circuit Court, Ninth Circuit, Northern Dist. of Cal.

MURRAY GIBSON, Plaintiff,

vs.

DAVIDSON BROS. MARBLE COMPANY, a Corporation, *et als.*, Defendants.

STATE OF CALIFORNIA, *City and County of San Francisco, ss:*

E. C. Luchessa, of the said City and County, having been first duly sworn, deposes and says:

That he is, and at all times herein mentioned, was a citizen of the United States, over twenty-one years of age; and is competent to be a witness on the hearing of the matters mentioned in the annexed printed copy of Notice, that he has no interest whatsoever in the matters mentioned therein; that he is; and at all times embraced in the publication herein mentioned, was the Principal Clerk of the Printers and Publishers of "The Recorder," a newspaper of general circulation, printed and published daily (Sundays excepted) in said City and County.

That deponent, as such clerk, during all times mentioned in this affidavit, has had, and still has, charge of all the advertisements in said newspaper.

That a Notice, of which the annexed is a true printed copy, was published in the above named newspaper on the following dates, to wit: November 23, 24, 26, 27, 28, 29, and 30, 1906; and December 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, and 17, 1906; being for a perior of three (3) successive weeks; and further deponent sayeth not.

E. C. LUCHESSA.

Notice.

Notice is hereby given that a suit has been commenced in the United States Circuit Court for the Northern District of California, by the United States of America on the relation of and for the use and benefit of Murray Gibson, plaintiff, against Davidson Bros. Marble Company, a corporation, Samuel A. Tolman and John A. Tolman, defendants, to recover on a bond given by said defendants, dated October 18, 1901, to secure the performance of a contract dated October 10, 1901, made by Davidson Bros. Marble Company and the United States for certain work on the United States Post Office Building at San Francisco. Any creditor has a right to intervene and file his claim in such action and be made a party thereto within one year from the completion of the work under
27 said contract and not later.

Dated November 22, 1906.

ROB'T T. DEVLIN,
Attorney for Plaintiff.

Nov. 23-21t.

Subscribed and sworn to before me this 17th day of December, 1906.

[SEAL.] HENRY B. LISTER,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Filed January 24, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

28 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA on the Relation of MURRAY GIBSON, Trading as John Gibson, and for His Use and Benefit, Plaintiff,

versus

DAVIDSON BROTHERS MARBLE COMPANY, a Corporation Organized under the Laws of the State of Illinois, and SAMUEL A. TOLMAN and JOHN A. TOLMAN, Residents of the State of Illinois, Defendants.

Demurrer.

The defendants in the above entitled cause and each of them, not waiving but expressly avowing and maintaining their Motion to quash the service of the Summons herein and dismiss the said Cause hereby by their Attorneys, W. Rigby and W. J. Tuska Demur to the complaint of the plaintiff herein upon the following grounds:

First. That the Court has no jurisdiction of the defendants or either of them.

Second. That the plaintiff is not a resident or citizen of the Northern District of California in the Ninth Judicial Circuit or of the State of California.

Third. That the defendants are not nor is either of them a resident or citizen of the Northern District of California in the Ninth Judicial Circuit or of the State of California.

Fourth. That at the time of the commencement of this action the plaintiff Murray Gibson trading as John Gibson was and now is a citizen and resident of the State of Pennsylvania and that at the time of the commencement of this action the defendants
29 were and each of them was and now is a Citizen and resident of the State of Illinois.

Fifth. That this Court has no jurisdiction of the subject of the action.

Sixth. That this Court has no jurisdiction of the controversy alleged in the complaint.

Wherefore the defendants pray to be hence dismissed with their cost,

W. RIGBY &
W. J. TUSKA,
Attorneys for Defendants.

(Endorsed:) Received a copy of the within demurrer this 9th day of January 1907. Robt. T. Devlin Attorney for Plaintiff. Filed January 9, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

30 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA on the Relation of MURRAY GIBSON, Trading as John Gibson, and for His Use and Benefit, Plaintiff,

versus

DAVIDSON BROTHERS MARBLE COMPANY, a Corporation Organized under the Laws of the State of Illinois, and SAMUEL A. TOLMAN and JOHN A. TOLMAN, Residents of the State of Illinois, Defendants.

Motion to Quash Service and to Dismiss.

To the Plaintiff and Robert T. Devlin, Esq., his Attorney:

The defendants above named and each of them hereby appear specially in the above entitled cause for the purpose only of moving the said Court to quash and set aside the service of the summons in the said Cause and to dismiss the said action upon the ground that the said Court has no jurisdiction of the persons of the defendants, and upon the further ground that the said Court has no jurisdiction of the person of the plaintiff, and upon the further ground that neither the plaintiff nor the defendants or any or either of them are Citizens of the State of California or residents of the Northern District of California in the Ninth Judicial Circuit, and upon the further ground that the said Court has no jurisdiction of the controversy at issue. The said Motion will be based upon the Complaint of the plaintiff and all subsequent proceedings and the return of service of said summons herein and will be brought on
31 for hearing before the said Court on the 21st day of January, 1907, at 10 o'clock in the forenoon or as soon thereafter as Counsel can be heard.

Dated, San Francisco January 9th 1907.

W. RIGBY &
W. J. TUSKA,
Attorney for Defendants, Specially Appearing for Purposes Above Stated.

(Endorsed:) Received a copy of the within notice of motion this 9 day of January 1907. Robt. T. Devlin Attorney for plaintiff. Filed January 9, 1907. Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

32 At a stated term, to wit: the November term A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Monday the 28th day of January in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable Edward Whitson, District Judge, Eastern District of Washington, Designated to hold and holding this Court.

No. 14124.

U. S. OF AMERICA *ex Rel.* MURRAY GIBSON, Trading as John Gibson, and for His Use and Benefit, Plaintiff,

vs.

DAVIDSON BROS. MARBLE COMPANY, etc., *et al.*

Order Denying Motion to Quash Service and Overruling Demurrer.

Defendants' demurrer and motion to quash the service of the summons herein and dismiss the said Cause, heretofore heard and submitted to the Court for consideration and decision, being now fully considered and the Court having delivered and filed its opinion, it is in accordance with said opinion, Ordered that said Motion to quash service of summons herein and Dismiss the said cause be and hereby is denied and that said demurrer be and hereby is overruled.

33 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON

versus

DAVIDSON BROS. MARBLE COMPANY ET AL.

Petition for Rehearing of Motion to Quash Service of Summons, etc.

The defendants above named hereby pray the Honorable Circuit Court to grant them a rehearing upon their motion to quash the service of the Summons herein and upon their demurrer heretofore filed herein to the Complaint for want of jurisdiction of the Court, and hereby notify the plaintiff that they will apply to the said Circuit Court on the eleventh day of February, 1907, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard at the Court room of the said Court in the Post Office Building at the corner of Seventh and Mission Streets in the City and County of San Francisco State of California, for an order granting such rehearing of their said motion and demurrer upon the grounds that the same is in furtherance of Justice, that the question discussed by the Court in its opinion upon the former hearing of the said motion and demurrer was not raised by the plaintiff; that the defendant has had no opportunity to meet the objection raised for the first time by the Court after argument; that the rule of Court to-wit, Rule No. 22, is invalid and in contravention of the statutes and violative of the defendant's rights under the constitution and statutes of the United States.

That said motion will be based upon the complaint and all
34 the papers and proceedings in this action.

Dated February 4th 1907.

W. RIGBY &
W. J. TUSKA,
Defendants' Att'ys.

To the Plaintiff and Robt. T. Devlin, U. S. Att'y & Att'y for Plaintiff.

Points and Authorities in Support of the Foregoing Motion.

It is and has always been the practice in the State Courts of California that where a defendant is improperly brought into Court that he may appear specially to quash the services of process, and that when he announces himself as so specially appearing for such particular purpose, his appearance will be so treated and not otherwise.

The penalty following an unsuccessful, restricted or limited appearance is a judgment or default against the defendant.

But said penalty is not and cannot in justice be visited upon him if his contention is successful, *where the Court sustains the objection to the jurisdiction made by him.*

The objection to the jurisdiction of the Court need not be made by either party.

Where there is a want of jurisdiction, such want of jurisdiction *cannot be waived by the parties* but will be noticed by the Court of its own motion.

Empire Coal Co. *versus* Empire Coal Co. 150 U. S. 159.

A special appearance for the purpose of objecting to the jurisdiction is not a waiver.

Southern Pacific Co. *versus* Denton, 146 U. S. 202.
Harkness *versus* Hyde, 99 U. S. 476.

35 In Southern Pacific Co. *versus* Denton (*supra*) Justice Gray says: "The want of jurisdiction being apparent on the face of the petition may be taken advantage of by demurrers and no plea in abatement is necessary.

Circuit Courts must dismiss suits improperly brought therein *ex mero motu.*

Indiana *versus* Lake Erie R. Co. 85 Fed. Rep. 1 and cases therein cited.

Even during the trial when it becomes manifest that the Court has no jurisdiction, Judge must dismiss the case.

Blythe *versus* Hinckley 84 Fed. Rep. 246.
United States *versus* Barrett 135 Fed. 189.

The Act of Congress provides that in actions at law the same practice shall govern as in the State where the United States Court is held.

Sec. 430 of the Code of Civil Procedure (State of California)

provides that the defendant may demur to the Complaint upon the ground:

"1. That the Court has no jurisdiction of the person of the defendant, or the subject of the action."

If the defendant prevails upon either ground the cause must be dismissed.

Whereas in the case at bar the defendant demurred upon the grounds that the Court has no jurisdiction of the person of the defendant—and upon the further ground that the Court has no jurisdiction of the subject of the action,—there is no waiver of the former ground, unless upon the hearing he has abandoned one or the other of the grounds specified.

This the defendant has not done.

The defendants in this cause sought two remedies both open to them, each, while aiming at the same result, directed to
36 a different point. By this motion to quash, the defendants sought to set aside the *invalid service* of process upon them in a foreign jurisdiction and announced that they appeared specially for that and no other purpose.

The Court holding with the defendants that the process of the Court does not run beyond the district wherein the Court sits disposes of that question, the defendants go hence as the Court never *acquired* jurisdiction of their persons in the cause by the service in the foreign state.

That question could not be reached by demurrer.

That was not a defect appearing upon the face of the complaint; the defendants would prevail upon that motion even though it appeared from the complaint that the Court had jurisdiction of the person of the defendants *when properly served.*

But where it appears upon the face of the Complaint that the Court has no jurisdiction of the person of the defendants that defect must be pointed out by demurrer, and if shown to exist the demurrer should be sustained no matter how many other grounds of demurrer may be pleaded, with the one attacking the Court's jurisdiction.

Rule 10 of the Circuit Court of the Ninth Circuit provides:

"In actions at law the pleadings shall be in accordance with the laws of the States as the same shall exist at the time, etc."

Sec. 430 C. C. P. Cal. above referred to specifies as one of the grounds of demurrer want of jurisdiction of the person.

According to Rule 10 therefore, where it appears upon the face of the Complaint that the Circuit Court has no jurisdiction
37 of the person of the defendant, the defendant may in the Circuit Court raise that point by demurrer alone.

The complaint in this cause shows by direct averment that the Circuit Court has no jurisdiction of the persons of the defendants.

The plaintiff pleads himself out of Court by alleging that neither party nor anyone of the defendants is a citizen of or resides in the State of California.

The Court of its own motion under the cases above cited upon an inspection of the complaint would be obliged to dismiss the action, whether service of the summons had been had or not, for upon the

face of the Complaint the question of the legality of the service cannot arise.

The Court has power to allow a general notice of appearance to be amended, so as to make it special only.

United States *versus* Yates, 6 How., 603.
Hohorst *versus* Hamburg etc. Co., 38 Fed., 273.

Rule 22 of this Court is unreasonable, and is in conflict with the general laws of Congress and the Constitution.

It seeks to restrict the defendants in the exercise of a guaranteed right by imposing a penalty upon them where the Justice of his plea is manifest.

The rule says to him: You may appear specially and so state in the paper that you serve, but if you do not say in the same paper that you will appear generally if the Court denies your motion, no matter how correct your contentions, how valid in law your objections, the Court shall ignore them.

But Rule 22 does not apply to the defendants in this case for no leave is required of the Court to appear specially to nullify an illegal act done by a Court officer or by any one assuming to
38 act under invalid process. It is not such a "purpose for which leave to appear could be granted by the Court."

Mahr *versus* Union Pacific R. Co., cited by the Court in its opinion denying the defendants' motion to quash and overruling their demurrer seems to us not to apply to the present case.

In that case the Court said "If he sets up the Court has no jurisdiction over the subject of the actions he waives the want of service by entering voluntarily into the controversy which goes to the merits and thereby submits himself to the jurisdiction over his person.

The question of the want of jurisdiction of the person of the defendants was not in that case raised by demurrer.

The defendants here expressly reserved *his* right to a special appearance. Waived nothing and so the learned counsel for the plaintiff understood it.

We therefore respectfully pray that an opportunity be granted to the defendants to submit their views upon the questions here discussed to the Court upon a rehearing of the motion and demurrer and that the former decision thereon be set aside for that purpose.

W. RIGBY &
W. J. TUSKA,
Counsel for Defendants.

(Endorsed:) Copy Received this 4 February 1907. Robt. T. Devlin, Plaintiff's Att'y. Filed February 4, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

39 At a stated term, to-wit: the November term A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San

Francisco, on Tuesday the 12th day of February in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable John J. De Haven, District Judge.

No. 14124.

U. S. *ex Rel.* MURRAY GIBSON, etc.,
vs.
DAVIDSON BROS. MARBLE COMPANY, etc., *et al.*

Order Denying Petition for Rehearing of Motion to Quash Service of Summons.

Upon motion of W. J. Tuska, Esq., on behalf of defendants, it is ordered that the order heretofore made herein on February 11, 1907, denying defendants' motion for rehearing of Motion to quash service of summons and to dismiss the said cause be and the same hereby is set aside. Thereupon said Motion for rehearing was argued by W. J. Tuska, Esq., counsel for defendants, and Robert T. Devlin, Esq., counsel for plaintiff in opposition thereto, and submitted to the court for consideration and decision, and being now fully considered by the Court, it is ordered that said motion for rehearing be and the same hereby is denied, and that defendants have one week within which to serve and file their answers herein. Counsel for defendants, in open Court, waived notice of said decision and of the order fixing time within which to answer.

40 In the Circuit Court of the United States in and for the Ninth Judicial Circuit, Northern Division of California.

No. 14124.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, etc.,
Plaintiff,
versus
DAVIDSON BROTHERS MARBLE COMPANY ET AL., Defendants.

Stipulation Extending Time to Answer.

The defendants not waiving but still maintaining their special and limited appearance herein and their petition for a re-hearing upon their motion to quash the service of summons herein and upon their demurrer heretofore filed herein to the complaint for want of jurisdiction of the Court and without prejudice

It is hereby stipulated that the time for the defendants to *as* answer the complaint herein be and the same is hereby extended five (5) days from and after the 10th instant.

Dated February 8th, 1907.

ROBT. T. DEVLIN,
Plaintiff's Attorney.

(Endorsed:) Filed February 11th 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

41 At a stated term, to wit: the November term A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Saturday the 23d day of February in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable John J. De Haven, District Judge.

No. 14124.

U. S. *ex Rel.* MURRAY GIBSON, etc.,
vs.
DAVIDSON BROS. MARBLE COMPANY ET AL.

Order for Default of Defendants.

In this cause, it appearing to the Court that the defendants, Davidson Bros. Marble Company, a Corporation, Samuel A. Tolman and John A. Tolman, having failed to answer plaintiff's complaint within the time allowed by the order of Court and the further time allowed by the stipulation of plaintiff and that the time for answering has expired; Now, upon motion of Robt. T. Devlin, Esq., attorney for plaintiff, it is Ordered that the default of the defendants Davidson Bros. Marble Company, a corporation, Samuel A. Tolman and John A. Tolman be and hereby is entered.

42 At a stated term, to wit: the November term A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Wednesday the 27th day of February in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable John J. De Haven, District Judge.

No. 14124.

U. S. *ex Rel.* MURRAY GIBSON, etc.,
vs.
DAVIDSON BROS. MARBLE COMPANY, etc., *et al.*

Order Directing Entry of Judgment.

Upon motion of George Clark, Esq., upon behalf of Robt. T. Devlin, Esq., attorney for plaintiff herein and it appearing to the Court that the default of the defendants for failure to answer was heretofore entered on the 23d day of February A. D. 1907 and the Court being fully advised, It is Ordered, that judgment be entered herein in favor of plaintiff and against the defendants in accordance with the prayer of the complaint for $4425.00 together with $289.93 as interest thereon and costs to be taxed.

43 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA on the Relation of MURRAY GIBSON, Trading as John Gibson (and for His Use and Benefit), Plaintiff,

vs.

DAVIDSON BROS. MARBLE COMPANY, a Corporation Organized under the Laws of the State of Illinois, and SAMUEL A. TOLMAN and JOHN A. TOLMAN, Defendants.

Judgment.

The above entitled cause came on regularly for hearing this 27th day of February, 1907, before the Court, upon the complaint of the plaintiff taken as confessed by the defendants, the default of the defendants and each of them for not having answered the complaint of the plaintiff having heretofore been regularly entered in said cause, and it appearing that the defendants and each of them having prior to the entry of the said default demurred to the said complaint, and the demurrer to the said complaint having been prior to the said entry of the said default by the order of this Court duly given, made and entered on the 23d day of February, 1907, regularly overruled and the time allowed by law and the order of this Court upon the overruling of the said demurrer having prior to the entry of the said default expired, and it further appearing that the said default of the said defendants and each of them was in all respects regularly entered, the Court now being fully advised as to the law and the facts and having duly considered the same,

It is hereby Ordered, Adjudged and Decreed that the plaintiff for the use and benefit of Murray Gibson, trading as John Gibson,

do have and recover of and from the defendants the sum of

44 Four Thousand Four Hundred and Twenty Five ($4425.00) Dollars, together with interest thereon at the rate of 7% per annum, from March 20, 1906, amounting in all to $4714.93, and costs of suit taxed at $36.50.

Done in open court this 27th, day of February, 1907.

SOUTHARD HOFFMAN, *Clerk.*

A True Copy,
Attest:
[SEAL.] SOUTHARD HOFFMAN, *Clerk,*
By J. A. SCHAERTZER,
Deputy Clerk.

(Endorsed:) Filed February 27, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

45 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 14124.

UNITED STATES OF AMERICA on the Relation of MURRAY GIBSON, Trading as John Gibson, and for His Use and Benefit, Plaintiff,

vs.

DAVIDSON BROS. MARBLE COMPANY, a Corporation Organized under the Laws of the State of Illinois, and SAMUEL A. TOLMAN and JOHN A. TOLMAN, Residents of the State of Illinois.

Certificate to Judgment Roll.

I, Southard Hoffman, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above entitled action.

Attest my hand and the seal of said Circuit Court, this 27th day of February 1907.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*,
By W. B. MALING, *Deputy Clerk*.

(Endorsed:) Judgment Roll. Filed February 27th 1907, Southard Hoffman, Clerk, By W. B. Maling, Deputy Clerk.

46 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Trading as John Gibson, and for His Use and Benefit, Plaintiff,

vs.

DAVIDSON BROTHERS MARBLE COMPANY, a Corporation, *et al.*, Defendants.

Opinion on Motion to Quash Service of Summons and on Demurrer.

Robert T. Devlin, United States Attorney, for Plaintiff.
W. Rigby and W. J. Tuska, for Defendants.

WHITSON, *District Judge:*

This is an action brought pursuant to the provisions of an Act of Congress as amended on the 24th day of February, 1905, 33 Stats. at Large, p. 811. The defendants deny that the Court has jurisdiction over them, which is raised by a motion to quash and set aside service of summons and dismiss the action, and this upon the ground that neither the plaintiffs nor the defendants, nor any or either of them are citizens or residents of the State of California,

and upon the further ground that the Court has no jurisdiction of the subject matter. They have also raised the same points by demurrer.

As to the subject matter, the statute is perfectly plain. Congress, after providing that suits of this character shall be brought in the district in which the contract was to be performed and executed, irrespective of the amount in controversy, provided that it should not be brought elsewhere. That it had the right to make this provision fixing the jurisdiction of a court which it created, it seems to me beyond controversy.

47

But upon the point as to the jurisdiction over the persons of the defendants, the argument is made that notwithstanding the statute giving jurisdiction of the subject matter, the method of acquiring jurisdiction has not been specially provided for, and, therefore, the general Act applies, and the plaintiff not having brought itself within its provisions, relating to service of process, has acquired no jurisdiction over the person. It is well settled, I believe, that the process of the Federal courts does not run beyond their territorial jurisdiction. Substituted service is provided for in certain specified cases, but beyond that, and possibly some other exceptions which are expressly mentioned, jurisdiction over the person must be acquired by virtue of some statute of the United States, and no statute has been called to my attention which provides that an action may be brought in one state and served upon a defendant in another state and thereby require the defendant thus served to submit himself to the jurisdiction of the Court.

Jurisdiction may be acquired in two ways: First, over the person, who must be served within the limits defined by law within which the court has power to act, and, second, by a proceeding *in rem* against property of the defendant found within such territorial limits. This has always been the rule, and since the decision of Pennoyer *v.* Neff, 95 U. S. 714, and cases which have followed that decision, it has never been questioned, as far as I know.

The statute does not appear to provide for service upon the defendants, and I incline strongly to the view that it must be construed in connection with the general statute by which jurisdiction is acquired over parties defendant.

48

Adverting to the argument of counsel that it is the duty of courts to give a sensible construction to a statute, it must be said that it is not within their province to enlarge upon their own jurisdiction when they are unable to point to any statute which authorizes such construction. The courts of the United States are of limited jurisdiction. They must look to the statutes of the United States for the power they would exercise, and nothing has been called to my attention which in any way convinces me that the statute in question was intended to authorize the courts to subject persons outside of their own jurisdiction to such jurisdiction by personal service, other than by the methods provided by the statutes generally upon that subject. These observations are only made because the argument on behalf of the defendants has profoundly impressed me, and because, as at present advised, it would apparently be a

usurpation on the part of the Court to undertake to read into a statute something which Congress has not placed there.

But I do not find it necessary nor do I decide this question. The point upon which I base my decision is this: Rule 22 of this Court provides that "any party may, without leave of court, appear specially in any action at law or suit in equity for any purpose for which leave to appear could be granted by the Court, by stating in the paper which he serves and files, that the appearance is special and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the Court, he will appear generally in the case within the time allowed therefor by law or by the order of Court or by stipulation of the parties. If such
49 statement be not made as above provided, the appearance shall be deemed and treated as a general appearance." No such stipulation is made in the motion, and the demurrer, while reserving the points made by the motion, certainly constitutes a general appearance. I had occasion to consider this rule in the case of Mahr *v.* Union Pacific Railroad Company, 140 Fed. 921, and upon the conclusion reached in that case the holding will be that the defendants have voluntarily submitted themselves to the jurisdiction of the court, which does have jurisdiction over the subject matter, specially conferred by Congress. The motion will accordingly be denied, and the demurrer overruled.

(Endorsed:) Filed Jan'y 28 1907, Southard Hoffman, Clerk, By W. B. Maling, Deputy Clerk.

50 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 14124.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiffs,
vs.
DAVIDSON BROS. MARBLE COMPANY ET AL., Defendants.

Defendants' Engrossed Bill of Exceptions on Motion to Quash Service of Summons.

Be it remembered: On the 7th day of January, 1907, the said defendants did file a notice of motion to quash the service of summons in this action and at the same time did prepare and file a demurrer to the merits of the action. The said notice of motion to quash service of summons was in the words and figures following, to wit:

"In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiffs,
versus
DAVIDSON BROS. MARBLE COMPANY ET AL., Defendants.

To the Plaintiff and Robert T. Devlin, Esquire, His Attorney:

The defendants above named and each of them hereby appear specially in the above entitled cause for the purpose only of moving the said Court to quash and set aside the service of the summons in the said cause, and to dismiss the said action upon the ground that the said Court has no jurisdiction of the persons of the de-
51 fendants, and upon the further ground that the said Court has no jurisdiction of the person of the plaintiff, and upon the further ground that neither the plaintiff nor the defendants or any or either of them are citizens of the State of California, or residents of the Northern District of California in the Ninth Judicial Circuit, and upon the further ground that the said Court has no jurisdiction of the controversy at issue.

The said motion will be based upon the complaint of the plaintiff and all subsequent proceedings and the return or service of said summons herein and will be brought on for hearing before the said Court on the 21st day of January, 1907, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated San Francisco, January 9th, 1907.

W. RIGBY AND
W. J. TUSKA,
Attorneys for Defendants, Specially Appearing for Purposes Above Stated."

The said demurrer was in the words and figures following, to wit:

"In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiffs,
versus
DAVIDSON BROS. MARBLE COMPANY ET AL., Defendants.

The defendants in the above entitled cause and each of them, not waiving but expressly avowing and maintaining their motion to quash the service of the summons herein and dismiss the said cause, hereby by their attorneys, W. Rigby and W. J. Tuska, de-

mur to the complaint of the plaintiff herein upon the following grounds:

First. That the Court has no jurisdiction of the defendants or either of them.

Second. That the plaintiff is not a resident or citizen of the Northern District of California in the Ninth Judicial Circuit or of the State of California.

52 Third. That the defendants are not nor is either of them a resident or citizen of the Northern District of California in the Ninth Judicial Circuit or of the State of California.

Fourth. That at the time of the commencement of this action the plaintiff Murray Gibson trading as John Gibson was and now is a citizen and resident of the State of Pennsylvania and that at the time of the commencement of this action the defendants were and each of them was and now is a citizen and resident of the State of Illinois.

Fifth. That this Court has no jurisdiction of the subject of the action.

Sixth. That this Court has no jurisdiction of the controversy alleged in the complaint.

Wherefore, the defendants pray to be hence dismissed with their costs.

W. RIGBY AND
W. J. TUSKA,
Attorneys for Defendants."

The said motion to quash the service of summons and the said demurrer were argued before the Court and heard at the same time. As a part of the proceedings the plaintiff introduced into evidence the return of the Marshal attached to the service of summons in the words and figures following, to wit:

"I have served this writ within my district in the following manner, to wit:

Upon the within named Davidson Bros. Marble Company, a corporation, by reading the same to and within the presence and hearing of Joseph Urig, Secretary of the said Company, and at the same time delivering to him personally a true copy thereof together with a copy of the bill of complaint on the 10th day of December, A. D. 1906.

I was unable to find the President or other officer of the said company within my district.

Upon the within named John A. Tolman by reading the same to and within his presence and hearing and at the same time delivering to him personally a true copy thereof together with a copy of the bill of complaint on the 10th day of December, A. D. 1906.

Upon the within named Samuel A. Tolman by reading the same to and within his presence and hearing and at the same time delivering to him personally a true copy thereof together with a copy of the bill of complaint on the 12th day of December, A. D. 1906.

LUMAN T. HOY,
U. S. Marshal,
By THOS. MIDDLETON, *Deputy.*

Marshal's Fees.

3 services	$6.00
4 miles	.24
	$6.24"

And also the order of this Court heretofore made on the
53 22nd day of November, 1906, in the words and figures following, to wit:

"In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiffs,
vs.
DAVIDSON BROS. MARBLE COMPANY ET AL., Defendants.

Suit having been commenced to recover on a bond given by defendants to secure the performance of a contract dated October 10, 1901, between the United States and Davidson Bros Marble Company, a corporation for certain work on the United States Post Office and Court House Building at San Francisco,

It is ordered that notice of the pendency of such suit shall be given by the attorney for the plaintiff substantially in the following form:

Notice is hereby given that a suit has been commenced in the United States Circuit Court for the Northern District of California, by the United States of America, on the relation of and for the use and benefit of Murray Gibson, plaintiff, against Davidson Bros. Marble Company, a corporation, and Samuel A. Tolman and John A. Tolman, defendants, to recover on a bond given by said defendants, dated October 18, 1901, to secure the performance of a contract dated October 10, 1901, made by Davidson Bros. Marble Company and the United States for certain work on the United States Post Office and Court House Building at San Francisco. Any creditor has a right to intervene and file his claim in such action and be made a party thereto within one year from the completion of the work under said contract and not later.

And that the same shall be given publication in 'The Recorder,' hereby designated as a newspaper of general circulation published in the City and County of San Francisco, State of California, where the contract was to be performed, for at least three successive weeks.

JOHN J. DE HAVEN, *Judge.*
ROBT. T. DEVLIN,
Attorney for Murray Gibson,
Trading as John Gibson.

Dated November 22d, 1906."

54 And the affidavit showing publication, as per the above order, which is in the words and figures following, to-wit:

"In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiffs,
vs.
DAVIDSON BROS. MARBLE COMPANY ET AL., Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

E. C. Luchessa, of the said City and County, having been first duly sworn, deposes and says:

That he is, and at all times herein mentioned was, a citizen of the United States, over twenty-one years of age, and is competent to be a witness on the hearing of the matter mentioned in the annexed printed copy of Notice; that he has no interest whatsoever in the matters mentioned therein; that he is, and at all times embraced in the publication herein mentioned was, the Principal Clerk of the Printers and Publishers of 'The Recorder,' a newspaper of general circulation, printed and published daily (Sundays excepted) in said newspaper. That a Notice, of which the annexed is a true printed Copy, was published in the above named newspaper on the following dates, to wit: November 23, 24, 26, 27, 28, 29 and 30, 1906; and December 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15 and 17, 1906: being for a period of three (3) successive weeks; and further deponent sayeth not.

E. C. LUCHESSE.

Subscribed and sworn to before me this 17th day of December, 1906.

[SEAL.] HENRY B. LISTER,
Notary Public in and for the City and County of San Francisco, State of California.

Notice.

Notice is hereby given that a suit has been commenced in the United States Circuit Court for the Northern District of California, by the United States of America, on the relation of and for the use and benefit of Murray Gibson, plaintiff, against Davidson Bros. Marble Company, a corporation, and Samuel A. Tolman and John A. Tolman, defendants, to recover on a bond given by said defendants, dated October 18, 1901, to secure the performance of a
55 contract dated October 10, 1901, made by Davidson Bros. Marble Company and the United States for certain work on

the United States Post Office Building at San Francisco. Any creditor has a right to intervene and file his claim in such action and be made a party thereto within one year from the completion of the work under said contract and not later.

Dated November 22, 1906.

ROBT. T. DEVLIN,
Attorney for Plaintiff."

The same was taken by the Court under advisement and on the 28th day of January, 1907, the Court denied said motion and overruled said demurrer.

That on the said 28th day of January, 1907, the said plaintiff did give written notice to the said defendants, and their attorneys, of the said order of the Court denying their said motion and overruling said demurrer.

On the 4th day of February, 1907, the said defendants did make, file and serve upon the plaintiff a notice of motion in the words and figures following, to wit:

"In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiffs,
versus
DAVIDSON BROS. MARBLE COMPANY ET AL., Defendants.

The defendants above named hereby pray the Honorable Circuit Court to grant them a rehearing upon their motion to quash the service of the Summons herein and upon their demurrer heretofore filed herein to the Complaint for want of jurisdiction of the Court, and hereby notify the plaintiff that they will apply to the said Circuit Court on the eleventh day of February, 1907, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the court-room of the said Court in the Post Office Building at the corner of Seventh and Mission Streets, in the City and
56 County of San Francisco, State of California, for an order granting such rehearing of their said motion and demurrer upon the grounds that the same is in furtherance of justice, that the question discussed by the Court in its opinion upon the former hearing of the said motion and demurrer was not raised by the plaintiff, that the defendant has had no opportunity to meet the objection raised for the first time by the Court after argument, that the rule of Court, to wit: Rule No. 22, is invalid and in contravention of the statutes and violative of the defendants' rights under the Constitution and Statutes of the United States.

The said motion will be based upon the complaint and all the papers and proceedings in this action.

Dated February 4th, 1907.

W. RIGBY AND
W. J. TUSKA,
Def'ts Att'ys."

To the Plaintiff and Robt. T. Devlin, U. S. Att'y & Att'y for Plaintiff.

Said motion was heard on the 11th day of February, 1907, and by the Court denied.

Rule 22 of the Circuit Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, which was and is:

Rule 22. *Special Appearance.*—Any party may without leave of Court, appear specially in any action at law or suit in equity, for any purpose for which leave to appear could be granted by the Court, by stating in the paper which he serves and files that the appearance is special and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the Court, he will appear generally in the cause within the time allowed therefor by law or by the order of the Court or by stipulation of the parties.

If such statements be not made as above provided, the appearance shall be deemed and treated as a general appearance.

In connection with such special appearance the party may obtain from the Court *ex parte* and without any written application therefor, an order extending his time to appear generally until his application on special appearance shall have been disposed of or until a fixed time thereafter, which order shall be filed, and a copy thereof served on the adverse party, or he may obtain a similar extension by stipulation from the adverse party. Such extension, whether by order or stipulation, shall not operate to convert the special appearance into a general one.

The agreement for a general appearance as above provided for shall be binding on the party appearing specially as aforesaid, and if he neglects to keep such agreement he shall be deemed and
57 treated to have appeared generally on the day on which his agreement required him so to appear.

Neither the said undertaking for a general appearance, nor any general appearance made after the determination by the Court of the objections raised under such special appearance, shall be deemed a waiver of any objection actually made under such special appearance.

Rule 75 of the Circuit Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California.

Rule 75. *Bill of Exceptions.*—A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at the time the ruling is made or at any subsequent time during the trial or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time here-

inafter mentioned, and when so signed shall be filed with the Clerk. If not settled and signed as above provided a bill of exceptions may be settled and signed as follows:

The party desiring the bill shall within ten days after the ruling was made, or if such ruling was made during a trial within ten days after the rendition of the verdict, or, if the case was tried without jury, within ten days after written notice of the rendition of the decision serve upon the adverse party a draft of the proposed bill of exceptions. The exceptions must be accompanied with a concise statement of so much of the evidence or of the matter as is necessary to explain the exception and its relation to the case and to show that the ruling tended to prejudice the rights of such party.

Within ten days after such service the adverse party may serve upon the proposing party proposed amendments to the proposed bill.

Such proposed bill and the proposed amendments shall within five days thereafter be delivered by the proposing party to the Clerk for the Judge.

The Clerk must as soon as practicable thereafter deliver said proposed bill and amendments to the Judge, who must thereupon designate a time at which he will settle the bill and the Clerk must as soon as practicable thereafter notify or inform both parties of the time so designated by the Judge.

In settling the bill of exceptions the Judge must see that it conforms to the truth and that it is in proper form notwithstanding that it may have been agreed to by the parties or that no amendments may have been proposed to it and must strike out of it all irrelevant, unnecessary, redundant and scandalous matter.

After the bill is settled it must be engrossed by the party who proposed the bill and the Judge must thereupon attach his certificate that the same is a true bill of exceptions and said bill must thereupon be filed with the Clerk.

58 Relying upon said Rule 75, and within the time allowed by law for the presentation of amendments to the said Bill of Exceptions, the plaintiff made objection to the settlement of this Bill of Exceptions or any Bill of Exceptions on the ground that the same had not been presented within ten days after the rendition of the decision or within the time allowed by law or the rules of this court, and that the said defendants have thereby waived their right to present such Bill of Exceptions no extension of time having been allowed by the court to the defendants to present the same. Such objection was overruled by the court, plaintiff duly accepted, which exception was allowed. The defendants, by their counsel, duly excepted to the decision of the court upon said motion to quash the service of summons and upon said demurrer to the complaint.

The foregoing Bill of Exceptions having been prepared and served in due time is hereby settled and allowed as correct and as a true Bill of Exceptions and made a part of the records in the above entitled action.

Dated March 28, 1907.

EDWARD WHITSON, *Judge.*

[Endorsed:] Filed April 1st 1907. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk.

59 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiffs,
versus
DAVIDSON BROS. MARBLE COMPANY, SAMUEL A. TOLMAN, and JOHN A. TOLMAN, Defendants.

Petition for Writ of Error.

To the Honorable Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California:

The petition of the defendants above named respectfully show to this Court:

That by the judgment of this Court entered on the 27th day of February, 1907, a manifest error hath happened to the great damage of the said defendants, and they are desirous that the said errors should be duly corrected and full and speedy justice done in the said cause

Therefore the said defendants pray this Court that a writ of error may issue directed to this Court and that all proceedings upon the said judgment may be heard in the Supreme Court of the United States of America for the correcton therein of such error as aforesaid

WM. RIGBY &
WAL J. TUSKA,
Attorneys for the Defendants.

Allowed
JOHN J. DE HAVEN, *Judge.*

March 2- 1907.

(Endorsed:) Filed March 2, 1907. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

60 In the Circuit Court of the United States, in the Ninth Judicial Circuit, for the Northern District of California.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON
vs.
DAVIDSON BROS. MARBLE COMPANY ET AL.

Whereas, the Circuit Court of the United States, in the Ninth Judicial Circuit, For the Northern District of California, rendered its judgment in the above cause, in favor of the plaintiff, and against the defendants. The said defendants, Davidson Bros. Marble Company, John A. Tolman and Samuel A. Tolman, hereby assigns as

errors in the said judgment and the rulings of the Court therein, the following:—

Assignment of Errors.

First, the Court erred in denying defendants' motion to quash the service of summons made by them.

Second, the Court should have granted the said motion upon the ground that the Court had no jurisdiction of the persons of the defendants; and that the service of the said summons was improperly and illegally made.

Third, the Court erred in overruling the defendants' demurrer to the complaint herein.

Fourth, the Court should have sustained the said demurrer as it appears upon the face of the complaint that the Court has no jurisdiction of the persons of the defendants; and that the Court had no jurisdiction to hear and determine the said cause.

All of which is respectfully submitted.

WM. RIGBY &
WAL J. TUSKA,
Counsel for Defendants.

(Endorsed:) Filed March 2, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

61 In the Circuit Court of the United States, Ninth Judicial Circuit, for the Northern District of California.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiff,
vs.
DAVIDSON BROS. MARBLE COMPANY ET AL., Defendants.

Bond on Writ of Error.

Whereas on the 27th day of February, 1907, a Judgment was rendered and entered by the Circuit Court of the United States in the Ninth Judicial Circuit for the Northern District of California in an action therein pending wherein United States of America on the relation of Murray Gibson is plaintiff, and Davidson Bros. Marble Company, Samuel Tolman and John A. Tolman are defendants, in favor of the plaintiff and against the defendants for the sum of Four Thousand Four Hundred and 25/100 Dollars ($4,400.00) Dollars, debt interest and costs; and

Whereas the defendants feeling aggrieved thereby have petitioned for a writ of error to issue out of the Supreme Court to the said Circuit Court of the United States aforesaid to correct the errors in the record and proceedings and the said Judgment in the said cause by them complained of;

Now, therefore, we, the undersigned do hereby bind ourselves our heirs, executors and administrators, jointly and severally, firmly by these presents in the sum of Five Hundred Dollars ($500.), and

undertake and promise that the said above named defendants will well and diligently prosecute the said writ of error to effect in the Supreme Court of the United States, and will pay all costs that may be awarded against them in the event that they fail to make
62 their plea good, or said write be dismissed.

Dated at San Francisco, California, this 2nd day of March A. D. 1907.

NATIONAL SURETY COMPANY,
[SEAL.] By FRANK L. GILBERT,
Resident Vice-President.

Attest:
A. E. OBERG,
Resident Asst. Secretary.

(Endorsed:) The within bond approved this 2d of March 1907, John J. DeHaven, Judge. Filed March 2, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

63 Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiff,
against
DAVIDSON BROS. MARBLE COMPANY ET AL., Defendants.

Certificate as to Jurisdictional Questions.

To the Honorable the Supreme Court of the United States:

I, the undersigned Judge hereby certify that in the foregoing entitled action the defendants, as appears from the record therein objected to the Jurisdiction of the Circuit Court of the United States in the Ninth Judicial Circuit for the Northern District of California, by motion and by a demurrer duly filed therein, and that the said objections were overruled by the Court and in due time judgment rendered by the Court in favor of the plaintiff and against the defendants. And the defendants having prayed for the issuance of a writ of error that the matters involved in the said motion and demurrer may be heard by the Supreme Court of the United States I hereby further certify that the only questions to be decided upon and under the said writ of error the said Supreme Court are

First. Whether the Circuit Court of the United States in the Ninth Judicial Circuit for the Northern District of California had jurisdiction of the persons of the defendants.

Second. Whether the Circuit Court of the United States in the Ninth Judicial Circuit for the Northern District of California
64 had Jurisdiction to hear and determine the cause.

All of which is respectfully submitted.

JOHN J. DEHAVEN, *Judge.*

(Endorsed:) Filed March 2, 1907, Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

65 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

UNITED STATES OF AMERICA *ex Rel.* MURRAY GIBSON, Plaintiff,
versus
DAVIDSON BROTHERS MARBLE COMPANY, SAMUEL A. TOLMAN, and JOHN A. TOLMAN, Defendants.

Order Extending Time to File Record.

For satisfactory reasons appearing to me the time for filing the record in this Cause in the Supreme Court of the United States, pursuant to the appeal sued out, is extended until the 1st day of May, 1907.

Dated April 4th, 1907.

JOHN J. DE HAVEN,
United States District Judge.

(Endorsed:) Filed April 5, 1907, Southard Hoffman, Clerk.

66 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14124.

UNITED STATES OF AMERICA on the Relation of MURRAY GIBSON, Trading as John Gibson, and for His Use and Benefit, Plaintiff,
vs.
DAVIDSON BROS. MARBLE COMPANY, a Corporation; SAMUEL A. TOLMAN, and JOHN A. TOLMAN, Defendants.

Certificate to Record on Writ of Error.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing sixty-five (65) pages, numbered from 1 to 65, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein-entitled cause, as the same remains of record and on file in the office of the clerk of said Circuit Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $41.30; that said amount was paid by Wm. Rigby, attorney for the above-named defendants; and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Circuit Court, this 24th day of April, A. D. 1907.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the Circuit Court of the United States, in the Ninth Judicial Circuit, for the Northern District of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between United States of America on the relation of Murray Gibson, plaintiff, and Davidson Bros. Marble Company, Samuel A. Tolman and John A. Tolman, defendants, a manifest error hath happened, to the great damage of the said defendants Davidson Bros. Marble Company, Samuel A. Tolman and John A. Tolman as by their complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and fully and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington in the District of Columbia on the second Monday of April next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be- inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 2d day of March in the year of our Lord one thousand nine hundred and seven and of the independence of the United States the one hundred and thirty-first.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN, *Clerk,*
By J. A. SCHAERTZER,
Deputy Clerk

The above writ of error is hereby allowed.

JOHN J. DE HAVEN,
U. S. District Judge, Northern District of California.

67½ [Endorsed:] R. L. No. 14124. In the Supreme Court of the United States of America. Davidson Bros. Marble Company *et al.* plaintiffs in error *vs.* United States of America *ex rel.* Murray Gibson, defendant in error. Writ of Error. Received a copy of the within Writ of Error this — day of March 1907. —— ——, Att'y for Plaintiff. Filed March 2, 1907. Southard Hoffman, Clerk, By J. A. Schaertzer, Deputy Clerk.

The Answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the Supreme Court of the United States, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN, *Clerk.*

68 UNITED STATES OF AMERICA, *ss:*

To United States on the relation of Murray Gibson, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the eighth day of April, A. D. 1907, pursuant to a writ of error issued by the Supreme Court of the United States to the Circuit Court of the United States, in the Ninth Judicial Circuit for the Northern District of California to correct errors in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court and entered February 27th, 1907, and in which Davidson Bros. Marble Company, Samuel A. Tolman and John A. Tolman, are plaintiffs in error, and you are Defendant in error, to show cause, if any there be, why the errors appearing in the said record, proceedings and judgment mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. De Haven, U. S. District Judge for the Northern District of California, sitting as Judge of said Circuit Court of the United States, Ninth Judicial Circuit, this second day of March A. D. 1907, and of the Independence of the United States, the one hundred and thirty-first.

JOHN J. DE HAVEN, *Judge.*

69 [Endorsed:] R. L. No. 14,124. In the Supreme Court of the United States of America. Davidson Bros. Marble Company *et al.*, Plaintiffs in error *v.* United States of America *ex rel.* Murray Gibson, defendant in error. Citation. Received a copy of the within citation this — day of March, 1907. ——— ———, attorney for pl'ff. Filed March 2, 1907. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

70 [Endorsed:] Edwin M. Ashcraft, Att'y for Pl'ffs in Error, 1021 The Temple, Chicago, Ills.

Endorsed on cover: File No. 20,698. N. California C. C. U. S. Term No. 304. Davidson Bros. Marble Company, Samuel A. Tolman, and John A. Tolman, plaintiffs in error, *vs.* United States of America on the relation of Murray Gibson. Filed May 4, 1907. File No. 20,698.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1908.

DAVIDSON BROS. MARBLE CO. et al.,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA on the Relation of Murray Gibson,
Defendant in Error.
No 78-20698

Error to Circuit Court of the United States for Northern District of California.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT.

The question presented by this writ of error is whether or not the Circuit Court for the Northern District of California, had jurisdiction of the persons of plaintiffs in error to enter judgment *in personam* against them. The action (Rec., 1.) is at law by the United States on the relation of Murray Gibson on a bond made by plaintiffs in error on October 10th, 1901, as provided fo v law (Act of August 13, 1894, ch. 280, 288 Stat. L., 278) for certain work on the Post Office and Court House building at San Francisco.

The record, in short, presents as I maintain the question as to whether or not the Act of Feb. 24, 1905, amending the above act *under* which said bond was made, is or not retroactive. The Circuit Court, Northern District of California holding it is.

The complaint alleges (Rec., 1) that plaintiffs in error are all residents and citizens of the State of Illinois, and that Murray Gibson, on whose relation the action was brought (Rec., 2) resided in the State of Pennsylvania.

Summons was served upon plaintiffs in error by the United States Marshal for the Northern District of Illinois and in the State of Illinois. (Rec., 14.)

Plaintiffs in error, by local counsel, entered their special appearance (Rec., 18) for the purpose only of moving the court to quash and set aside the service of summons and to dismiss the action upon the ground that the court had no jurisdiction of the person of the defendants and had no jurisdiction of the person of the plaintiff, and that neither the plaintiff nor the defendants were citizens of the State of California, or residents of the Northern District of California, in the Ninth Judicial Circuit, and at the same time (Rec., 17) "not waiving, but expressly avowing and maintaining their motion to quash the service of summons herein and dismiss the cause" filed a special demurrer claiming the court had no jurisdiction of the defendants; that plaintiff was not a resident of the Northern District of California or of the State of California; that defendants nor either of them were residents of the Northern District of California or of the State

of California, and that at the time of the commencement of the action Murray Gibson was a citizen of Pennsylvania and the defendants were citizens of Illinois, and that the court had no jurisdiction of the subject of the action or the controversy alleged in the complaint. (a.)

The motion to quash and the demurrer were overruled. (Rec., 19.) Plaintiffs in error stood by their motion and demurrer and judgment was entered against them (Rec., 25) for $4,714.93 and costs of suit.

The Act of February 24, 1905, (Ch. 774, 32 Stat. L., 811) amending the Act of 1894, in force when the bond sued upon was made, provided that other creditors could intervene, and for giving notice to all known creditors and notice by publication in newspapers that any creditor had a right to intervene and file his claim and be made a party thereto within one year of the completion of the work under the contract, but not later than November 22, 1906, and under this provision a notice was given creditors (Rec., 16) of the pendency of the suit. This notice is referred to for the reason it was urged upon argument, its publication was sufficient notice to give the court jurisdiction to enter judgment against plaintiffs in error *in personam*.

Rule 22 of the Circuit Court, Northern District of California, Third Rose's Code of Federal Procedure, page 2261, provided that any party, without leave of court, might appear specially in any action by stating that the appearance was special, and that "if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in

the cause within the time allowed therefor by law or by the order of court, or by stipulation of the parties. If such statement be not made, as provided, the appearance shall be deemed and treated as a general appearance."

Rule 93, Vol. 3, Rose's Code of Federal Procedure, page 2293, provided:

> "Objections to the jurisdiction of this court as a Federal Court over any action at law or suit in equity, whether commenced in this court, or removed from a state to this court and not remanded, may be taken as follows: If the objections appear on the face of the complaint or bill, it may be taken either by demurrer or by motion to dismiss, 'provided that the court may, in its discretion, on sustaining the motion to dismiss, allow the complaint or bill to be amended. If the objections do not appear on the face of the complaint or bill, it may be taken in an action at law by the answer, and in a suit in equity, by a plea to the jurisdiction. If not taken as above provided, and the facts in relation to the jurisdiction do not subsequently appear in the course of the proceeding, the court may refuse to allow the party thereunder to take proceedings for the purpose of making such facts appear. But if such facts do subsequently develop in the course of the proceedings, the party may then move to dismiss the case, or, if it was removed from a state court, to remand it to such court, or the court may dismiss or remand it of its own motion,' *provided that in whatever mode the objection can be taken, and whether it be taken by the court of its own motion or by a party to the cause, the party affected shall be accorded a hearing on the question.*"

In entering the special appearance and motion to quash, plaintiffs in error did not agree, if the

court sustained the jurisdiction and overruled the motion, it would enter a general appearance, and Judge Whitson, District Judge, in his opinion, which is made a part of the record in this case (Rec., 26), said:

> "The point upon which I base my decision is this: Rule 22 of this court provides that, any party may, without leave of court, appear specially in any action at law or suit in equity, for any purpose for which leave to appear would be granted by the court, by stating in the paper which he serves and files that the appearance is special, and that if the purpose for which such special appearance is given shall not be sanctioned or sustained by the court, he will appear generally in the case within the time allowed therefor by law or by the order of court, or by stipulation of the parties. If such statement be not made as above provided, the appearance should be deemed and treated as a general appearance; no such stipulation is made in the motion and the demurrer, while reserving the points made by the motion, certainly constitutes a general appearance."

In other words, Judge Whitson was of opinion that unless in entering the special appearance, whether to move to quash service, or to demur for want of jurisdiction, appearing upon the face of the complaint, such special appearance, unless plaintiffs in error agree in advance they would enter a general appearance if such motion or demurrer was overruled, should be treated as a general appearance and that plaintiffs in error were not entitled to a hearing on its attack on the jurisdiction of the court.

The questions certified by the trial court are as follows:

"I hereby certify that the only questions to be decided upon and under the writ of error to the said Supreme Court are:

"1st. Whether the Circuit Court of the United States in the Ninth Judicial Circuit for the Northern District of California had jurisdiction of the persons of the defendants;

"2nd. Whether the Circuit Court of the United States in the Ninth Judicial Circuit for the Northern District of California had jurisdiction to hear and determine the cause."

The errors assigned are:

1st. The court erred in denying defendant's motion to quash the service of summons;

2nd. The court should have granted the said motion upon the ground that the court had no jurisdiction of the persons of the defendants, and that the service of said summons was improperly and illegally made;

3rd. The court erred in overruling the defendant's demurrer to the complaint herein;

4th. The court should have sustained the said demurrer as it appears upon the face of the complaint that the court has no jurisdiction of the persons of the defendants and that the court had no jurisdiction to hear and determine the said cause.

BRIEF.

I.

THE UNITED STATES IS THE REAL PLAINTIFF AND NOT A NOMINAL PARTY.

U. S. Fidelity Co. v. *Kenyon*, 204 U. S., 349.

II.

THE ACT OF FEBRUARY 24, 1905, IS NOT RETROACTIVE AND THE ACT OF AUGUST 13, 1894, GOVERNS IN THIS CASE.

U. S. Fidelity Co. v. *United States for use*, 209 U. S., 306.

III.

THIS ACTION SHOULD HAVE BEEN PROPERLY BROUGHT IN THE NORTHERN DISTRICT OF ILLINOIS, THE DISTRICT OF WHICH PLAINTIFFS IN ERROR ARE INHABITANTS.

Sec. 1, Act of March 1, 1887, 24 Stat., ch. 373.

McCormick Harvesting Machine Co. v. *Walthers*, 134 U. S., 41.

In re Keasby & Mattison Co., 160 U. S., 221.

In re Wisner, 203 U. S., 449.

IV.

PLAINTIFFS IN ERROR HAVE NOT VOLUNTARILY SUBMITTED TO THE JURISDICTION OF THE COURT OR WAIVED THEIR PRIVILEGE OF BEING SUED IN THE DISTRICT OF WHICH THEY ARE INHABITANTS.

Western Loan & Savings Co. v. *Butte & Boston Consolidated Mining Co.*, 210 U. S., 368.

St. Louis & San Francisco R. R. Co. v. *McBride*, 141 U. S., 127.

Harkness v. *Hyde*, 98 U. S., 476-479.

Southern Pacific Co. v. *Denton*, 146 U. S., 202.

V.

THE CIRCUIT COURT OF THE NORTHERN DISTRICT OF CALIFORNIA HAS MISCONSTRUED RULE 22 OF ITS RULES OF COURT AND IF IT HAS NOT SAID RULE 22 IS UNREASONABLE AND INVALID.

Rule 93, Vol. 3 Rose's Code of Federal Procedure, p. 2293.

Southern Pacific Co. v. *Denton*, 146 U. S., 202.

ARGUMENT.

This action was brought in the Circuit Court for the Northern District of California on a bond given by plaintiffs in error, citizens and residents of the State of Illinois, on October 10, 1901, as provided by the Act of August 13, 1894, Ch. 288, S. L., 278, on account of certain work done on the Post Office and Court House building in San Francisco by one of plaintiffs in error, on the theory that the amendment of this law, by the Act of February 24, 1905, Ch. 778, S. 32, L. 811, was retroactive and gave the court in California exclusive jurisdiction of the subject matter although all the defendants were citizens and residents of the State of Illinois.

This court has decided in *U. S. Fidelity Co.* v. *Kenyon*, 204 U. S., 349, that the United States is the real party plaintiff for jurisdictional purpose.

This court also decided in *U. S. Fidelity Co.* v. *United States, for use*, 209 U. S., 306, that the procedure in any suit upon this bond, the same being executed under the Act of 1894, prior to its amendment in 1905, should be governed by the Act of 1894.

Section 1 of Act of March 1, 1887, 24 Stat., Ch. 373, as corrected by the Act of August 13, 1888, provides, as construed in this court, that if the jurisdiction of the Federal Court is founded upon any of the clauses mentioned in that section, except the citizenship of the parties, the action shall be brought in the district of which the defendant is an inhabitant, and if founded upon the diverse citizenship of the parties the action may be brought in

the district of which either the plaintiff or defendant is an inhabitant.

McCormick Harvesting Machine Co. v. *Walthers*, 134 U. S., 41.

In re Keasby & Mattison Co., 160 U. S., 221.

In re Wisner, 203 U. S., 449.

It would thus appear that whether or not the United States was the real or nominal party plaintiff the action was brought in the wrong district, and that plaintiffs in error could not be called upon to defend this action in the Northern District of California unless they can be considered by this court to have waived their privilege of being sued in the district of which they are inhabitants and have consented to the Circuit Court for the Northern District of California taking jurisdiction over them.

At the time this action was brought *U. S. Fidelity Co.* v. *Kenyon, supra,* holding the United States was not a nominal party, had not been rendered, and the decision *U. S. Fidelity Co.* v. *United States for use, supra,* holding the Act of 1905 was not retroactive, had not been decided. Plaintiffs in error assumed the position that the Act of 1905 was not retroactive and that if any cause of action existed they were subject to suit in the State of Illinois, and sought by motion and special demurrer to raise the question of the jurisdiction of the Federal Court in California.

The Act of 1905 provided for notice to other creditors and that they should have a right to intervene within a limited time. This notice was given, and it was urged upon argument this notice was of

itself sufficient to give the court jurisdiction of plaintiffs in error to enable the court to render judgment *in personam*. The service of process had been by summons served upon them by the Marshal for the Northern District of Illinois in his district.

The decisions as to whether or not the United States was a nominal party, were in conflict at that time.

It was held in *U. S. for use, etc.*, v. *Henderlong*, 102 Fed., 2, that the United States was a nominal party and that the Federal Court had no jurisdiction unless the amount sued for on the bond exceeded Two Thousand Dollars.

It was held in *Mullin et al.* v. *United States for use*, 109 Fed., 817, the suit was one arising under the *Laws* of the United States and that the Federal Court had jurisdiction under the Act of 1875, regardless of the citizenship of the parties.

It is held in *U. S. for use, etc.*, v. *Sheridan et al.*, 119 Fed., 236, the action was not brought by the United States as plaintiff within the meaning of the Judiciary Act so as to give the Federal Court jurisdiction without regard to citizenship of the parties or the amount involved; that the United States was merely a nominal party.

The contrary was held in *U. S.* v. *Churchyard*, 132 Fed., 82, while it was held in *U. S. ex rel.* v. *Barrett et al.*, 135 Fed., 189, in the same circuit in which this suit was brought, it was not a suit in which the United States was plaintiff within the meaning and intent of Section 1 of the Judiciary Act, but one in which it is merely a nominal party, and that in the absence of express provision therefor in the statute a Federal Court is without jurisdiction without

the requisite diversity of citizenship and amount in controversy.

It was thought by plaintiffs in error the Act of 1894 was not repealed or altered by the Act of 1905 as affecting an action on the present bond, and that the better view was that the United States was a nominal party, and that Gibson, for whose use the suit was brought, had no right to bring suit in the Northern District of California, he residing in Pennsylvania, and plaintiffs in error all residing in the State of Illinois.

It was thought wise therefore to attack the jurisdiction of the Federal Court by a special motion to quash the service had upon plaintiffs in error in the Northern District of Illinois and to file a special demurrer, limiting the appearance for that purpose, to the jurisdiction of the court, it appearing by the averments of the complaint that Gibson, for whose use the suit was brought, resided in Pennsylvania, and that plaintiffs in error were all citizens and residents of the State of Illinois.

The jurisdiction of the court was attacked by special demurrer for the reason that the motion to quash service would not terminate the action and for the reason, it was insisted, as stated, the notice of publication made under the Act of 1905 would give the court jurisdiction even if it had no right to send process to the State of Illinois.

The special demurrer (Rec., 17), as well as the motion to quash, are to the *jurisdiction* of the court *solely*. The demurrer filed in this case is to be distinguished from such cases as:

> *Western Loan and Savings Co.* v. *Butte & Boston Consolidated Mining Co.*, 210 U. S., 368, and

St. Louis & San Francisco R. R. Co. v. *McBride*, 141 U. S., 127,

in each of which cases, while the demurrer raises a question of jurisdiction of the court, they were also to the merits of the controversy. The sufficiency of the declaration was challenged in each of said cases as not stating a good cause of action. There is no such question raised by the demurrer in this case. It is charged in this demurrer, all of which appears from the declaration or complaint, that defendants do not reside in the Northern District of California, in the Ninth Judicial Circuit, that they reside in the State of Illinois, and that Gibson, who brings the suit in the name of the United States, was a resident of the State of Pennsylvania, and therefore that the court had no jurisdiction of the persons of the plaintiffs in error or of the subject matter or controversy. No question is raised by this demurrer but what if the court had jurisdiction the complaint was entirely sufficient. The sufficiency of the cause of action is not challenged, but the jurisdiction of the court is.

The principle upon which this court has so frequently held defendants have waived the objection to the jurisdiction of the court, is confined to cases where pleas have been interposed to the merits of the action.

As said in *Harkness* v. *Hyde*, 98 U. S., 476-479:

> "It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

This case is in effect like *Southern Pacific Co.* v. *Denton*, 146 U. S., 202, where it is also expressly held that the question of citizenship, to give the court jurisdiction, when apparent on the face of the petition, may be taken advantage of by demurrer.

The late decision in *U. S. Fidelity & Guarantee Co.* v. *U. S. for use, etc.*, 209 U. S., 306, in every way sustains the contention of plaintiffs in error, to the effect that the bond sued upon in this case is governed by the statute of 1894, and that therefore the general statute requiring actions brought, in which the United States is interested, in the circuit or district in which the defendants reside, is in no way modified or repealed by the Act of 1905, and therefore the Circuit Court for the Northern District of California had no jurisdiction of this suit or the subject matter of the suit, or the contention between the parties as pointed out in this special demurrer, for the reason that it was expressly provided by statute the suit could only be brought, and the jurisdiction of the parties and the subject matter and the controversy could only be determined by suit brought, in the district in which the defendants reside. This is all that is contended for by the demurrer, and it is all the demurrer embraced. The sufficiency of the petition is not challenged. The cause of action is sufficiently stated in the complaint, but that court had no jurisdiction by reason of the statutes cited on account of the citizenship and residence of plaintiffs in error, and these facts of want of jurisdiction appeared upon the face of the complaint.

The Circuit Court, if its rules are valid, misconstrues them in holding plaintiffs in error entered a

general appearance. The learned Judge held that, because plaintiffs in error did not, in entering a special appearance, stipulate in writing they would enter a general appearance if the objection to the jurisdiction was overruled, the special appearance and special demurrer was a general appearance, and refused to pass upon the jurisdictional question raised.

It has been repeatedly held by this court that where special appearance is entered, either by motion to quash or by special demurrer and overruled, that even if the defendant then pleads to the merits he has not waived his objection to the jurisdiction.

Harkness v. *Hyde, supra.*

Southern Pacific Co. v. *Denton, supra.*

The learned Judge, in construing the rules of the court, erred, as it is contended, in his attempt to enforce rule 22. This rule should be construed with rule 93, where it is provided "that in whatever mode the objection can be taken, and whether it be taken by the court of its own motion, or by the party to the cause, *the party affected shall be accorded a hearing on the question*"; and it is submitted that all that could be done properly under this rule would be, after the party was accorded a hearing and his contention had been denied, to then hold the special appearance would amount to a general appearance; and without this clause, as shown, if the special appearance was entered and not sustained, the question of jurisdiction would not be waived even by a later plea to the merits; but in this cause, instead of pleading to the merits, or otherwise waiving the question of jurisdiction,

if such appearance or pleading would waive such privilege, plaintiffs in error stood by their motion and their demurrer, and it is perfectly plain that on the averments of this complaint the Circuit Court for the Northern District of California had no jurisdiction of the parties, of the subject matter or the contention between the parties. This they certainly did not do, as everything that was done, both by the demurrer and the motion, was to object to the jurisdiction of the court.

If, on the other hand, the rule was correctly construed, it would be unreasonable and invalid.

Southern Pacific Co. v. *Denton*, 146 U. S., 202.

It does appear from the record plaintiffs in error were not residents of the district where sued and it does not appear they have voluntarily submitted to the jurisdiction of the court.

It is respectfully submitted that the questions certified to this court should be answered in the negative and that the judgment of the Circuit Court for the Northern District of California should be reversed.

Respectfully submitted.

EDWIN M. ASHCRAFT,
Atty. for Plaintiffs in Error.

No. 78. OCTOBER TERM, A. D. 1908.

FILED.
NOV 20 1908
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

DAVIDSON BROS. MARBLE CO. *ET AL.*,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA ON THE RELATION OF MURRAY GIBSON,
Defendant in Error.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR NORTHERN DISTRICT OF CALIFORNIA.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

ROBERT T. DEVLIN,
HENRY P. BROWN,
Attorneys for Defendant in Error.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1908.

Davidson Bros. Marble Co. et al, Plaintiffs in Error, vs. *United States of America on the Relation of Murray Gibson, Defendant in Error.*	No. 78—20,698.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR NORTHERN DISTRICT OF CALIFORNIA.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

ARGUMENT.

This is an action brought by the United States of America upon the relation of Murray Gibson, against certain defendants under the Act of Congress (Stats. at L. 1905, page 1112) authorizing suit to be brought in

the name of the United States in the Circuit Court of the United States upon bonds for public work, providing such suit shall be brought in the district in which the contract was to be performed.

The complaint alleges (Rec., 1) that the United States entered into a certain contract with Davidson Bros. whereby they agreed to furnish all the labor and material and perform all the work required for the interior completion of the Post Office and Court House Building at San Francisco, and that they gave a bond for the faithful performance of the work. That thereafter, Davidson Bros. entered into a contract with Murray Gibson, subletting to him the contract for the marble mosaic work in the said building. That there is a balance due on said contract of $4425.

The suit was brought in the Northern District of California where the work was to be performed as required by statute. The defendants were served in the State of Illinois where they resided.

The defendants moved to quash the service of the summons and to dismiss the action (Rec., 18) upon the ground that the court had no jurisdiction of the person of the defendant or of the person of the plaintiff, and upon the ground that neither the plaintiff nor the defendants were citizens of the State of California, or resided in the Northern District of California, and also upon the ground that the court had no jurisdiction in the controversy at issue. At the same time, they filed a demurrer upon substantially the same grounds. (Rec., 17.) Both the motion to quash and the demurrer were argued before the court and heard at the same time. The court overruled the demurrer and denied the motion. (Rec., 26.)

The plaintiff in the court below, on the 28th day of June, 1907, gave written notice to defendants and their attorneys of this order of the court denying their motion, and overruling their demurrer.

On the fourth of February, 1907, the defendants filed a written paper which they called "Petition for rehearing." (Rec., 19.) This motion was heard on the eleventh day of February, 1907, and by the court denied. (Rec., 23.)

The defendants having failed to answer the complaint, and relying upon their motion to quash the service of summons, suffered default. Judgment was rendered against them, and from this judgment they appealed. (Rec., 24.)

Upon this appeal we desire to present to the court three points:

I. This court has no jurisdiction of the appeal, because the defendants did not comply with the rule of the court as to special appearance, and waived any right to object to the service.

II. The bill of exceptions of the defendants in the court below was not offered in time.

III. The Northern District of California is the only place allowed by statute in which to bring the action, and the defendants may be served in any part of the United States where found.

ARGUMENT.

I.

Rule 22 of the Circuit Court of the United States, in which this action was commenced and prosecuted, provides that

> "Any party may, without leave of Court, appear specially in any action at law or suit in equity for any purpose for which leave to appear could be granted by the Court, by stating in the paper which he serves and files, that the appearance is special and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the Court, he will appear generally in the case within the time allowed therefor by law, or by the order of Court or by stipulation of the parties. If such statement be not made as above provided, the appearance shall be deemed and treated as a general appearance."

The defendants in the court below made no such stipulation, and therefore their appearance was a general appearance. The court below declared the rule of court above stated applied, and held that their appearance was a general one.

It will be noticed in the motion that there was no attempt whatever to comply with this rule of court, and hence the defendants must be considered as appearing generally in the action. If this be true, it is immaterial where the defendants were served, or where they resided, because the general appearance will cure any defect in the service, provided the court had jurisdiction of the subject matter which it did have, under the statute. This rule was construed in

Mahr *vs.* Union Pac. R. Co., 140 Fed., 921;

The court in that case held that the right to make a special appearance is not a substantial one inherently existing, but is a privilege allowed by practice, and must be exercised within the rules of procedure, and the right of the defendant in the Federal Court to be sued in the district of his residence is one which he may waive and which is waived by general appearance. It was contended in that case that the rule referred to was invalid, but the court held it to be within the power of the court to make. The appearance, therefore, being general, the plaintiffs in error are in no position to urge the point sought to be made.

II.

The defendants in the court below did not present their bill of exceptions within the time limited by the rules of court. Rule 76 of the Rules of the Circuit Court provides that

> "A Bill of Exceptions to any ruling may be reduced to writing and settled and signed by the Judge at the time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the clerk."

The rule is set out in full in the bill of exceptions. It will be seen by reference to the bill of exceptions that the motion of the defendants in the court below to quash the service of summons was denied on the 29th day of January, 1907, and on the same day the plaintiff gave written notice to said defendants of the

order of court denying their motion and overruling the demurrer. The defendants in the court below, instead of presenting the bill of exceptions, endeavored to obtain a rehearing of the same, which was denied on the 11th day of February, 1907, and then, instead of answering plaintiff's complaint, decided to stand upon their motion, and allow a default to be entered. This was more than ten days after notice to them of the overruling of their motion. There is no practice which permits the filing of a notice of rehearing, and the same was an anomalous proceeding asking the court to review its decision. More than ten days after notice to them of the overruling of their motion to quash they presented a bill of exceptions, and the plaintiff in the court below made objection to its settlement on that ground. While the court below settled the bill, it set out Rule 75, showing that the defendants in the court below had not complied with the rule, thus affording this court the opportunity of determining whether or not said bill of exceptions was presented within the time required by the rules of court.

We submit that the bill of exceptions of the defendants was presented too late, and, therefore, this court has no jurisdiction of this appeal.

III.

The sole point upon which the defendants rely is, that the court had no jurisdiction either of the subject matter of the action or the persons of the defendants. The statute declares that the suit must be brought in the Northern District of California. It can, under the statute, be brought nowhere else. Hence, by the very language of the statute, the Circuit Court of the Ninth Circuit for the

Northern District of California, and no other court, has jurisdiction.

As to the jurisdiction over defendants, the argument is made that notwithstanding the statute gives jurisdiction of the subject matter, the method of acquiring jurisdiction has not been specially provided for, and therefore the general act applies, and as the plaintiff did not bring itself within its provisions, the court acquired no jurisdiction over the person.

The Statute of 1905 (see Stats. at L. 1905, 811–2) was enacted for the purpose of clearing all possible objections to the earlier act of August 30th, 1894.

The statute in its present form reads that the party aggrieved is authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which the contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere. for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution.

It will be observed by this amendment that the only court in which this action can be brought is the present court. This court has jurisdiction, and has *exclusive* jurisdiction, and no other court has jurisdiction of the controversy.

The statute provides further that, where a suit is instituted by a creditor or creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under the contract, and not later.

The statute further provides that if the recovery on the bond shall be inadequate to pay the amounts found

due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on the bond is authorized to pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to-wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability.

The statute further provides that in such a suit, such personal notice of the pendency of the suit informing them of their right to intervene as the court may order shall be given to all known creditors, and in addition thereto, notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

It will be observed that the object of this statute is to make the liability upon the bond practically a trust fund, to be administered by a court of equity sitting in the place in which the contract was to be performed.

The object and scope of this statute are very fully considered in the case of U. S. *vs.* Churchyard, 132 Fed., 85. In that case the court said that the object of Congress was to provide an equivalent or substitute for the familiar legislation for the protection of laborers and materialmen; and that the justification for legislation by Congress on the subject must be that as a builder of public works it is entitled to provide that those persons who incorporate their labor and materials into public works shall receive protection. The court said it could hardly be doubted that Congress might have provided

for a contract between the Government and the contractor for public works which would give to the Government the right to withhold the contract price until the satisfaction of claims for labor and material, or permit the United States to pay directly the laborers and materialmen in case of default by the contractor.

The court said that the contract was in the strictest sense a contract between the United States and the contractor for public works—that the defendant has bound himself to the United States to the amount of the penal sum of the bond. The penalty is defeasible upon two conditions: First, that the contractor shall do his work; second, that he shall pay his laborers and materialmen.

The court held that a failure to pay laborers and materialmen is a breach of an obligation to the United States assumed by the contractor under the requirement of an Act of Congress, and that it was the apparent intent of Congress to work out the protection of materialmen and laborers through a contract between the United States and the contractor.

The court in that case quotes with approval the language of Judge Putnam in the case of the American Surety Co. *vs.* Lawrenceville Cement Co., 96 Fed., 25, 26, as follows:

> "The United States, by the force of the statute which we have cited, voluntarily make themselves trustee alike for their own interests and for the interests of the individuals intended to be protected; and, having thus voluntarily created and accepted a trust, they are barred by equitable principles from asserting for themselves any advantage over other beneficiaries."

Without accumulating decisions upon this point, it must be apparent that the contractor has, as a matter of contract, bound himself with the United States to allow actions of this kind to be prosecuted, and that the United States is practically a trustee for the benefit of all concerned. Only one action can be brought, the fund must be administered by the court, notice must be given to all the world by publication, and no particular claimant has any advantage over another. If it is not an action *in rem*, it is certainly *quasi in rem*, and such notice may be given as the statute may prescribe, or in the absence of that, the court may give such notice as it thinks proper.

Probably the only notice required by the statute is that by publication. This has been given, and the defendants have also been personally served.

It must follow as a logical conclusion that this court has exclusive jurisdiction of this action, and that the defendants may be served wherever found, or it may be that no personal service whatever is requisite. Any other construction of the statute would be an absurdity. In fact, the defendants in the court below admitted this in their brief by saying: "Whether the act as amended is nonsensical or of no value to the plaintiff is no concern of the courts." Resolved to its ultimate analysis, therefore, the defendants in the court below ask the court to place a construction upon an act that would be absurd and nonsensical. It is only necessary to say to that, that this act has been upon the statute books for many years, and that materialmen and laborers have supplied the Government upon the faith of it.

We contend in the first place that by the plain terms of the act notice of publication is probably sufficient,

and that even if service is required, the defendant may be served wherever found.

This is the universal rule of construction in the Federal courts.

Construction of statutes should be sensible; general terms should be so limited as not to lead to injustice, oppression or absurd consequences. It will always be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

U. S. *vs.* Kirby, 7 Wall., 486, 7.

Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, avoid an unjust or absurd conclusion.

In re Chapman, 166 U. S., 667.

In case of doubt, a literal construction leading to an absurdity must be rejected in favor of a more liberal, which will effectuate the object intended.

Wilson *vs.* Mason, 1 Cr., 101, 102.

A court should be ever astute in avoiding a construction which may be productive of much litigation and insecurity of titles.

Doolittle *vs.* Bryan, 14 How., 567.

Where statute provides for suits "by or against" national banks, and later statute on same subject omits "by," the omission will be regarded as accidental and suits may be brought.

Kennedy *vs.* Gibson, 8 Wall., 506.

Statutes should be construed so as to relieve State from imputation of bad faith.

Red Rock *vs.* Henry, 106 U. S., 604.

The Supreme Court will hesitate to accept construction of congressional act which would imply bad faith on the part of the Government.

Bate Refrigerating Co. *vs* Sulzberger, 157 U. S., 38–9.

Statutes should receive a sensible construction, such as will effectuate legislative intention, and avoid an unjust or absurd conclusion.

Law Ow Bow *vs.* U. S., 144 U. S., 59.

Whatever the language of the statute, its purpose must be determined by its natural and reasonable effect.

Railroad *vs.* Husen, 95 U. S., 472.

Where a particular construction of a statute will work injustice or occasion great inconvenience, it is to be avoided in favor of another and more reasonable construction possible.

Knowlton *vs.* Moore, 178 U. S., 77.

A literal interpretation, which would defeat the purposes of a statute, will not be adopted, if any other reasonable construction can be given to it.

Thompson *vs.* State, 20 Ala., 54.

Statutes should be construed with a view to the original intent and meaning of the makers; and such construction should be put upon them as best to answer that intention, which may be collected from the cause or necessity of making the act, or from foreign circumstances, and, when discovered, ought to be followed, although such construction may seem to be contrary to the letter of the statute.

Chesapeake & O. Canal Co. *vs.* Baltimore & O. R. Co., 4 Gill & J. I.

In construing statutes the court will consider the object of the enactments, and will not suffer it to be defeated, but will make them answer the intention which the legislature had in view, as collected from the cause or necessity of the statutes, though the construction seem contrary to the letter.

Baring *vs.* Erdman, Fed. Cas. No. 981.

In interpreting statutes it is the duty of the courts at all times to make such construction as shall suppress the mischief and advance the remedy.

Parkinson *vs.* State, 14 Md., 184.

In the construction of the Government building for which the bond in suit was given, every sub-contractor relied, and had a right to rely, upon this statute of the United States, which gives him security that his claim will be paid. The surety by the statute was also protected in that only one suit could be brought, and he was saved the inconvenience and expense of having a number of suits brought in many jurisdictions.

By the terms of the law and by the bond itself the statute became a part of the contract. To give any construction to the statute that would destroy it or render it useless would lead to the imputation of bad faith, and this construction, as said by the Supreme Court of the United States in Red Rock *vs.* Henry, *supra*, must under all circumstances be avoided.

The present suit is in reality a substitute for a suit to enforce a lien that would be brought by a private person; the Government not allowing a lien as such to rest upon the building, but giving to a sub-contractor the security of a bond as a substitute for the lien, and the policy of the law is in such cases to enable the suit

to be brought where the real property is situated, allowing defendants to be served all over the United States.

See Sec. 738, R. S. U. S.

Such section allows service to be made by publication upon non-resident defendants when they cannot be ascertained.

The provision found in the Act of 1905 is of equivalent effect by providing notice by publication, and is in harmony with the laws of the United States, providing that all suits relating to liens or trust funds should be tried in the jurisdiction in which the land or trust fund is situated, and all parties interested must appear in such action.

The statute imperatively provides that the suit must be commenced in the Northern District of California, where the work was performed. It does not allow the suit to be commenced at any other place. The statute has been complied with in every detail by the commencement of the suit and by the issuance of process. The contention of the plaintiff in error is, that although the suit was commenced in the Northern District of California, and although process was regularly issued, yet, unless the defendants happen to be in the Northern District of California, they cannot be served with process, and hence the suit would be nugatory. As this is a personal action, they cannot be served by publication of summons, and if the construction contended for by them should prevail, it would be necessary to read into the statute a clause that the statute would be unavailing unless the defendants should happen to be in the district in which the suit should be brought.

It is to be remembered that this work is on a public building of the United States, and the United States

has passed a remedial statute pledging its faith to sub-contractors. They may rely upon a bond given to the United States by the general contractor, but they are compelled to bring the suit in the district in which the property is situated. It may very well be said that no personal service of any kind is requisite, but if personal service is required at all, it may be made wherever the defendants are found. The judgment of the court below should be affirmed.

Respectfully submitted,

ROBERT T. DEVLIN,
HENRY P. BROWN,
Attorneys for Defendant in Error.